

Volume 11

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Susan Illston, Judge

DONALD C. BRYAN, ET AL.,)	
)	
Plaintiffs,)	
)	
VS.)	NO. CV 08-05221-SI
)	
WAL-MART STORES, INC.,)	
)	
Defendant .)	
_____)	

San Francisco, California
Tuesday, November 15, 2016

TRANSCRIPT OF TRIAL PROCEEDINGS

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8:34 a.m.

P R O C E E D I N G S

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(Proceedings were heard out of presence of the jury:)

THE COURT: Good morning. You may all be seated.

Are we ready?

MR. EDELMAN: We are ready. A couple things to report to Your Honor. Mr. Wagner and I have spoken, and he has decided he does not want to recall the Wal-Mart witnesses. So I think we're set on that.

We just wanted to ask you from a scheduling point of view in terms of the rest of this week, it seems likely, based on discussions that we've had, that we will both be done at some point tomorrow. And I believe that we had spoken about doing closings on Monday. So we wanted to ask you if that's your current thinking and then --

THE COURT: Well, I'll take your lead on this. That was -- that's what my plan had been. I've been stewing, of course, about jury instructions, so unless you wanted to do it differently, I'd suggest we finalize jury instructions on Thursday.

MR. WAGNER: Okay. And dismiss the jury then after Wednesday?

THE COURT: Yes.

MR. WAGNER: Okay.

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1 **THE COURT:** And ask them to come back on Monday. And
2 if we do that, then they will have a real good shot at
3 finishing before Thanksgiving.

4 **MR. WAGNER:** Right. I think, Your Honor -- I believe
5 your pretrial order limited us to an hour and a half in closing
6 so we will be done Monday by noon.

7 **THE COURT:** I think there is a real good prospect that
8 they will be back.

9 **MR. WAGNER:** Okay.

10 **THE COURT:** We could forge ahead on Thursday, but I
11 don't know exactly when we would finalize the instructions.

12 **MR. EDELMAN:** Right.

13 **MR. WAGNER:** Right. That doesn't seem -- okay.

14 **THE COURT:** Is that okay with everybody?

15 **MR. ARTENIAN:** I just wanted to check in on one
16 detail, the hour and a half on each side, can we divide our
17 hour and a half in closing and rebuttal?

18 **THE COURT:** Oh, absolutely.

19 Are we ready -- what are we doing? Are we doing more
20 depositions?

21 **MR. EDELMAN:** No. We're going to start with -- we're
22 going to start with Tony Fantasia, who is a witness at
23 Wal-Mart, and probably do three witnesses before we do more
24 depositions.

25 **THE COURT:** Okay.

PROCEEDINGS

1 (Proceedings were heard in the presence of the jury:)

2 **THE COURT:** So, counsel, I didn't ask you this before.
3 I will ask you now. The discussion we just had about timing, I
4 would like to share that with the jury. Is that okay with you
5 guys?

6 **MR. EDELMAN:** Certainly, Your Honor.

7 **MR. WAGNER:** Yes.

8 **THE COURT:** In terms of our timing expectations, we
9 expect that the evidence will end tomorrow. That is not our
10 promise, but that is our expectation.

11 If it does, then we won't have court on Thursday or Friday
12 and we'll come back on Monday, and that's when the lawyers will
13 do their closing arguments and that's when you'll get the case
14 for deliberation. If we don't finish tomorrow, then it will
15 slop over on to Thursday morning, but right now our plan is
16 that you wouldn't need to be here Thursday or Friday, but you
17 would need to be here Monday morning next week to hear the
18 closing arguments and to start deciding the case. So that's
19 the current plan, just so you know.

20 Okay. So defendants may call their next witness.

21 **MR. CRIPPS:** Thank you, Your Honor. We would like to
22 call Mr. Tony Fantasia.

23 **THE COURT:** All right.

24 **THE CLERK:** Go ahead and be seated. I'm going to take
25 your picture.

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1 Raise your right hand.

2 **ANTHONY FANTASIA,**

3 called as a witness for the Defendant, having been duly sworn,
4 testified as follows:

5 **THE CLERK:** So we want you to speak into this
6 microphone. And state your full name for the record.

7 **THE WITNESS:** Anthony Michael Fantasia.

8 **THE CLERK:** Anthony. Spell your last name.

9 **THE WITNESS:** F-A-N-T-A-S-I-A.

10 **THE CLERK:** Thank you.

11 **THE COURT:** Mr. Cripps.

12 **DIRECT EXAMINATION**

13 **BY MR. CRIPPS:**

14 **Q.** Good morning, Mr. Fantasia.

15 Ladies and gentleman, good morning.

16 Mr. Fantasia, where do you currently work?

17 **A.** I currently work for Wal-Mart Transportation.

18 **Q.** And can you describe for us what your role is at Wal-Mart.

19 **A.** Currently I am the regional safety manager for Region 1,
20 which is California and Arizona.

21 **Q.** All right. And in that role, can you describe for us what
22 your general duties and responsibilities are when it comes to
23 safety at the company.

24 **A.** Me and my department handle the compliance and OSHA, the
25 DOT and the OSHA part of the fleet. We maintain all the DQ

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1 files, all of the training files, all of the QHOS -- the hours
2 of service, and we also maintain the OSHA portion.

3 **Q.** How long have you been involved in safety at the company?

4 **A.** I was a driver from 1991 to 2010 for Wal-Mart
5 transportation.

6 In 2010 I switched over and was promoted up to safety
7 manager in Porterville, and in 2015 I was promoted to regional.

8 **Q.** As a safety manager in Porterville, you reported to
9 Mr. Nate Lewis?

10 **A.** Yes, sir, I did.

11 **Q.** We heard from Mr. Nate Lewis earlier in this trial.

12 **THE COURT:** Can you tell me what a DQ file is?

13 **THE WITNESS:** Driver qualification file, ma'am.

14 **BY MR. CRIPPS:**

15 **Q.** Do you have any certifications in safety?

16 **A.** I do. I have a Certified Director of Safety from NATMI,
17 North American Transportation Institute.

18 **Q.** Do you have any responsibilities when it comes to training
19 drivers in safety matters in California?

20 **A.** I do not at this level as a regional, but as a safety
21 manager I did, yes.

22 **Q.** Can you describe for us briefly what your role was in
23 terms of training drivers at Wal-Mart in safety back when you
24 were responsible for the Porterville area.

25 **A.** As a new hire, we would bring them in and they would spend

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1 a week in classroom training and that would consist of going
2 through the different divisions of HR, safety and operations.

3 As the safety portion of it, we would teach defensive
4 driving. We would teach HAZMAT because we do haul HAZMAT also.
5 And we would teach hours of service.

6 **Q.** When you say "hours of service," are you referring to the
7 rules that exist in terms of how drivers should log their time?

8 **A.** Yes, sir.

9 **Q.** And are there DOT or Department of Transportation
10 regulations that govern how drivers should log their time?

11 **A.** Yes, sir, there is. It's 395.1.

12 **Q.** I'm sorry?

13 **A.** It is. Department 395.1 is the DOT regulations.

14 **Q.** That's a code section of the Department of Transportation
15 regulations?

16 **A.** Yes, it is.

17 **Q.** Are there rules about how drivers should log their time on
18 ten-hour mandatory DOT breaks?

19 **A.** Yes, sir, there is.

20 **Q.** Okay. Is that also part of Section 395.1?

21 **A.** Yes, it is.

22 **Q.** All right.

23 **MR. CRIPPS:** Your Honor, permission to approach.

24 **THE COURT:** You may.
25

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1 **BY MR. CRIPPS:**

2 **Q.** Sir, I have marked as Defendant's Exhibit 672 -- I'm going
3 to give you a copy of that here.

4 Do you recognize this as the code section you just
5 described?

6 **A.** Yes, sir, it is.

7 **Q.** Where is the portion of the regulation that actually
8 speaks to how drivers should log their time during the DOT
9 mandatory 10-hour breaks?

10 **A.** It is actually Section G.

11 **Q.** Okay.

12 Your Honor, move admission of 672 and permission to
13 publish.

14 **MR. WAGNER:** Objection.

15 **THE COURT:** This is just a regulation?

16 **MR. CRIPPS:** Well, let me lay a little more
17 foundation.

18 **Q.** Mr. Fantasia, are these the rules that Wal-Mart follows in
19 practice in terms of training its drivers as to how to log
20 their time on 10-hour DOT layovers?

21 **A.** Yes, sir, it is.

22 **Q.** Okay.

23 Your Honor.

24 **THE COURT:** Can't he just tell us what they train them
25 to do? I don't think we need to start getting the law in as

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1 exhibits here.

2 **MR. CRIPPS:** Your Honor, one moment.

3 **THE COURT:** Sure.

4 (Defense counsel confer off the record.)

5 **MR. CRIPPS:** Your Honor, could we have a brief
6 sidebar?

7 **THE COURT:** Sure.

8 (The following proceedings were heard at the sidebar:)

9 **MR. CRIPPS:** Your Honor, the portions that we're
10 discussing are the portions that they train their drivers on,
11 and it's three sections that read very simply in terms of how
12 they need to log their time. So this is not going to be a
13 convoluted discussion of the law. It's going to be a
14 discussion about how they train their drivers in accordance
15 with these three sections and what they teach their drivers
16 along those lines.

17 **THE COURT:** So why can't he just say that?

18 **MR. EDELMAN:** Your Honor, if I could interject. There
19 has been mixed testimony in this case about whether drivers are
20 required to spend eight hours in a berth. Some of the drivers
21 have said they are.

22 Wal-Mart's testimony has been that's not what the
23 regulations require, and so part of showing the regulation is
24 to explain that there is not a rule that says that drivers have
25 to spend eight hours in the berth or ten hours in the berth.

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1 They can do a mixture any way that they want, and since all the
2 training at Wal-Mart is done based on these regulations, it
3 seems important for the jury to understand how Wal-Mart trains
4 its drivers and why.

5 **MR. ARTENIAN:** Your Honor, I object to that because I
6 think there is a regulation that you're not going to show and
7 now we're arguing what the law is or is not in front of the
8 jury. There is -- there is a regulation which we could pull
9 out and put in front of them and say, "Do you enforce this
10 regulation," and it is detailed and convoluted, but it says
11 what it says.

12 If Wal-Mart doesn't train in accordance with that, that's
13 fine, but I don't think putting actual regs in front of the
14 jury -- those are essentially jury instructions.

15 **THE COURT:** I agree. This is simple. He can have it
16 in front of him, if you want, so he can tell you what he does
17 and he can tell you that it's his belief it's in accordance
18 with all the rules and regulations, but I don't think we need
19 to get those in at this time as an exhibit through a witness.

20 **MR. CRIPPS:** Thank you, Your Honor.

21 (Sidebar conference ended)

22 **BY MR. CRIPPS:**

23 **Q.** Mr. Fantasia, what are the rules that you teach and train
24 drivers on at Wal-Mart in terms of how they should log their
25 time when they're on a DOT-mandated break?

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1 **A.** We teach our drivers the same policy as the DOT. There's
2 three ways that you can log your ten-hour break. You can log
3 your break ten hours of straight off-duty time and be away from
4 the truck. You can be in a motel; you can go watch a movie;
5 you can sleep at home. That's straight ten hours of off-duty
6 time.

7 The second option that the DOT lets us do and we follow is
8 you can log straight ten hours of off-duty sleeper berth.

9 Sleeper berth is when you're inside the sleeper berth area
10 of the tractor. Does not mean you are sleeping the whole time.
11 You could be watching TV. Most of our trucks do have TV's in
12 them. There is refrigerators; there is microwaves. So you are
13 just in that sleeper berth area of that truck.

14 The third is a combination of the two. You can log some
15 off -- off-duty time, you can log some off-duty sleeper berth
16 time in conjunction together, as long as that total between the
17 two totals up to a minimum of ten hours.

18 **Q.** All right. Now, as part of that training, is that
19 training all consistent, to your understanding, with what the
20 DOT regulations themselves set out?

21 **A.** Yes, it is.

22 **Q.** Now, when it comes to logging some time out of the sleeper
23 berth, some time in the sleeper berth, is there a minimum
24 amount of time for Wal-Mart drivers that they have to spend in
25 the sleeper berth?

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1 **A.** No, there is not. We follow the DOT requirements, and
2 there is no set time.

3 **Q.** So, for example, if they want to spend one hour in the
4 sleeper berth and nine hours outside of the sleeper berth,
5 would that be consistent with how Wal-Mart trains its
6 drivers --

7 **MR. WAGNER:** Objection, leading.

8 **THE COURT:** Overruled.

9 You can answer.

10 **THE WITNESS:** Yes, it would be. Yes.

11 **BY MR. CRIPPS:**

12 **Q.** Is that consistent also with your understanding of what
13 the DOT regulations also allow?

14 **MR. WAGNER:** Objection. Calls for a conclusion of
15 law.

16 **THE COURT:** Overruled.

17 You can answer.

18 **THE WITNESS:** Yes, sir, it is.

19 **BY MR. CRIPPS:**

20 **Q.** For Wal-Mart drivers in California, has there ever been a
21 rule that drivers spend at least eight hours in the sleeper
22 berth?

23 **A.** No, sir, there has not.

24 **Q.** Now, very early in this case, we heard testimony about a
25 potential murder in Santa Clarita.

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1 Is that anything that you're familiar with?

2 **A.** Murder, no. We did have a driver in Santa Clarita a few
3 years back that was on his ten-hour break, and I responded to
4 it, and he had had a few too many to drink and fell getting out
5 of the -- getting into the truck and later passed away.

6 **Q.** Is -- are you aware of any situation other than that where
7 somebody has passed away as a result of or during a layover?

8 **A.** No, sir, I'm not.

9 **MR. CRIPPS:** No further questions, Your Honor.

10 **THE COURT:** Thank you.

11 Who's up?

12 **MR. WAGNER:** Yes, Your Honor.

13 **THE COURT:** Mr. Wagner.

14 **MR. WAGNER:** Good morning. Good morning, ladies and
15 gentleman.

16 **CROSS-EXAMINATION**

17 **BY MR. WAGNER:**

18 **Q.** Good morning, Mr. Fantasia.

19 **A.** Good morning.

20 **Q.** You are the regional safety manager for Wal-Mart and I
21 assume safety for truck drivers; right?

22 **A.** Correct, yes.

23 **Q.** In California; right?

24 **A.** California and Arizona, yes.

25 **Q.** Now, as part of the safety measure, one of the things you

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1 do as a safety measure for truck drivers -- the truck drivers
2 have to do is before they start moving their vehicle at all in
3 the morning, they have to do a pre-trip inspection; right?

4 **A.** Correct.

5 **MR. CRIPPS:** Objection. Scope.

6 **THE COURT:** Overruled.

7 You can proceed.

8 **BY MR. WAGNER:**

9 **Q.** And you understand what has -- what -- as part of a
10 pre-trip inspection; correct?

11 **A.** Yes, sir, I do.

12 **Q.** And what are some of the things you have to do for a
13 pre-trip inspection?

14 **A.** Pre-trip inspections can vary, depending on the equipment
15 that you're getting into, whether you've been in the equipment
16 for -- for the whole week or whether you're just getting
17 assigned to the equipment that day. It also varies heavily on
18 the age of the equipment. You know, when you're assigned a
19 brand new truck, you don't usually check near as much as you do
20 when you're assigned an older truck.

21 So it does vary quite a bit. The trailers have been
22 already pre-tripped by our shop department and so they've done
23 an extensive pre-trip to the trailer already.

24 So a lot of the pre-trip, when you're hooking to our
25 equipment, is usually a light check, a damage check, and just

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1 minor pre-trips. And it's multitasking, you are doing a bunch
2 of different things at one time.

3 **Q.** Right. I'm not asking you about -- I know there are
4 certain inspections that have to be done of the vehicle
5 throughout the day. I'm talking about the very first one
6 before you go to the yard and hook or before you do anything
7 else, the inspection that has to be done on the truck.

8 **A.** The very first pre-trip done on the truck is when you hook
9 to your very first trailer.

10 **Q.** Well, that's not true, though, is it?

11 **A.** Yes, sir, that is true.

12 **Q.** Well, if you're out on the road and you do a layover in a
13 truck stop somewhere out on the highway, you're already hooked
14 to a trailer; correct?

15 **A.** Correct.

16 **Q.** So you have to do a pre-trip inspection in the morning,
17 and you're nowhere near a Wal-Mart distribution center or
18 store. You still have to do the pre-trip inspection; right?

19 **A.** Correct, yes.

20 **Q.** So there is no hook involved at all; right?

21 **A.** The majority of the time, no. Yes.

22 **Q.** So then you do your pre-trip inspection, and how long does
23 it take to do that pre-trip inspection?

24 **A.** There again, that can vary. It varies on, once again,
25 the -- if you've had the equipment all week -- if you've

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1 checked the oil on Monday and you've had the same truck all
2 week long, your pre-trips seem to be a little more quicker
3 because you're more familiar with the vehicle.

4 If you've had the same truck assigned to you for the last
5 year and a half, you seem to be a little quicker with the
6 pre-trips than somebody that just gets assigned a truck for the
7 first time. So the times can vary dramatically depending on
8 the truck, the trailer, and the driver.

9 **Q.** Isn't there a checklist that the driver has to go down for
10 every pre-trip inspection?

11 **A.** There is not a checklist. The DOT law clearly states the
12 driver has to be satisfied with the tractor.

13 **Q.** Doesn't that include checking the lug nuts on all the
14 tires to make sure that they're tight?

15 **A.** There's various different ways of doing that. Some
16 drivers might reach down and grab the lug nuts. Some drivers
17 may just look at the lug nuts. There again, it varies,
18 depending on the driver.

19 **Q.** How could you tell if a lug nut is tight just by looking
20 at it?

21 **A.** There's a couple of different ways. One is if you've got
22 a half inch of thread on one lug nut sticking out past the lug
23 and all of the others match that, then you're pretty safe that
24 they're all pretty tight.

25 Another way we use to verify that is if a lug nut is lose

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1 on a wheel and it has been lose for a couple of days, it will
2 show a rust ring, a little line that comes down off of the lug,
3 so you look heavily for those lines to see if there is any rust
4 lines on that.

5 **Q.** And how many lug nuts are there on each tire?

6 **A.** There is, I believe, 10.

7 **Q.** How many tires on each truck?

8 **A.** There is 18 tires, but there is not 18 sets of lug nuts.

9 **Q.** How many sets of lug nuts?

10 **A.** Ten.

11 **Q.** Okay. So there's 100 lug nuts to check?

12 **A.** Correct.

13 **Q.** Okay. And what about checking tire pressure?

14 **A.** The majority of the driver groups do not, and I did not
15 also as a driver. We did not check with a gauge. We have
16 what's called a tire thumper and you would thump the tire, and
17 it makes a different sound when it's -- there again, once you
18 have thumped tires for so many years, you have learned what the
19 sound is, and when one is low and when one is not, so you
20 basically thump the tires as you are walking by.

21 **Q.** Isn't it safer to use a gauge to check the air pressure in
22 a tire?

23 **A.** Safer? I would say no. It would be more precise.

24 **Q.** Okay. And so what else has to be done to -- on the
25 pre-trip -- the first pre-trip inspection of the day?

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1 **A.** There again, that depends on the driver. All he has --
2 the driver -- according to the DOT regulations and Wal-Mart
3 regulations is the driver has to be satisfied with the
4 equipment. What he checks on that to make himself satisfied is
5 up to that driver.

6 **Q.** So in order to comply with the safety regulations of the
7 various laws, the only rule is that the driver has to be
8 satisfied?

9 **A.** Correct, yes.

10 **Q.** So if there is a problem with the equipment and there is
11 an accident, all the driver has to do is say, "I'm satisfied,"
12 and then that will comply with the law?

13 **A.** I'm not a lawyer. I don't know.

14 **Q.** How long does it take to do the pre-trip inspection on an
15 average, on an average time?

16 **A.** I really couldn't give you an average because, like I
17 said, it varies heavily on the driver. I've known some that
18 are very quick at it. I know some that are very slow at it.
19 So it really varies on the driver. It depends on the
20 equipment. To just throw out a number to me would be
21 unrealistic.

22 **Q.** Does Wal-Mart keep any records as to how long it takes to
23 do a pre-trip inspection?

24 **A.** No, sir, we do not.

25 **Q.** Let's go to the post-trip inspection, the last inspection

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1 of the day. How long does it take to do that?

2 **A.** There again, that depends on the driver. We're right back
3 to -- that one is usually a little quicker because it's usually
4 just a walk around and check.

5 **Q.** Does Wal-Mart keep any records as to how long it takes to
6 do the end-of-the-day post-trip inspection?

7 **A.** How long it takes? No, we do not.

8 **Q.** What about are you familiar with how long it takes to fuel
9 the vehicle?

10 **A.** Pre-2002 or 2010 when I was a driver, yes.

11 **Q.** Okay. And how long did it take between the years of 2004
12 and 2010?

13 **A.** I fueled roughly twice a week, and between four to six
14 minutes. It was fairly quick. The -- the -- I don't know if
15 you've ever seen fuel hoses for trucks, but they're quite
16 large. They're not like a car hose. They're quite large so
17 they fill both tanks at the same time very quickly.

18 **Q.** And I'm not talking about just the time it -- the fuel is
19 running from the fuel tank into the diesel tank on the truck.
20 I'm talking about the time from the time the driver pulls into
21 the aisle -- the island, shuts down the vehicle, gets out of
22 the vehicle, goes over and does all the tasks it takes to
23 safely and adequately fill both of those hundred-gallon tanks
24 of diesel, and then hooking the fuel line back up to the fuel
25 island and then pulling the truck out. That whole process, how

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1 long does that take on an average before 2010?

2 **A.** On our yard, we don't fuel our trucks. We have people
3 fuel them for us so the driver doesn't get out.

4 If you're fueling at a truck stop, that is about what it
5 takes, about four to six minutes to get out, put the two lines
6 in. Everything is just like a -- just like fueling your car.
7 You put your credit card in, you punch your numbers, you fuel
8 your truck. So it's about four to six minutes.

9 **Q.** For both tanks?

10 **A.** They're fueled at the same time, yes.

11 **Q.** And does Wal-Mart keep any records as to how long it takes
12 to fuel these trucks?

13 **A.** No, sir, we do not.

14 **Q.** Are you familiar with how long it takes to wash the truck,
15 the tractors?

16 **A.** No, sir, I am not.

17 **Q.** Do you know if Wal-Mart keeps any records as to how long
18 it takes to wash the tractors?

19 **A.** Not that I know of, no, sir.

20 **MR. WAGNER:** One second, please, sir.

21 (Plaintiffs' counsel confer off the record.)

22 **BY MR. WAGNER:**

23 **Q.** What about do you know how long the average driver has to
24 wait in line, either at a Wal-Mart fueling station or at a
25 fueling station out on the highway before they can fuel?

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1 **A.** I would not know.

2 **Q.** What about the time -- does Wal-Mart keep any records on
3 that?

4 **A.** No, sir.

5 **Q.** What about the time it takes for the driver to do the
6 paperwork involved in paying for the fuel when they're on the
7 road? Do you know how long that takes in?

8 **A.** I do not. I'm the safety department. I don't deal with
9 pay.

10 **Q.** And Wal-Mart doesn't keep records on that, do they?

11 **A.** Not that I know of, no.

12 **MR. WAGNER:** I think that's all the questions I have.
13 Thank you, Mr. Fantasia.

14 **THE WITNESS:** Thank you.

15 **MR. CRIPPS:** Nothing further. The witness may be
16 excused, Your Honor.

17 **THE COURT:** All right. Thank you very much, sir. You
18 may be excused.

19 The defendants may call their next witness.

20 **MR. WONG:** Thank you, Your Honor. The defendants call
21 Mark Miller.

22 **THE CLERK:** What was the last name?

23 **MR. WONG:** Miller.

24 **THE CLERK:** You could be seated. I'll take your
25 picture.

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1 Raise your right hand.

2 **MARK MILLER,**

3 called as a witness for the Defendant, having been duly sworn,
4 testified as follows:

5 **THE CLERK:** Okay. Go ahead and state your full name
6 for the record.

7 **THE WITNESS:** Mark David Miller.

8 **THE CLERK:** Did you say Mark?

9 **THE WITNESS:** Mark, yes.

10 **THE CLERK:** M-A-R-K.

11 **THE COURT:** With a K?

12 **THE WITNESS:** Yes, ma'am.

13 **THE COURT:** Mr. Wong.

14 **MR. WONG:** Thank you, Your Honor.

15 **DIRECT EXAMINATION**

16 **BY MR. WONG:**

17 **Q.** Good morning, sir.

18 Good morning.

19 Please introduce yourself to the jury and tell them your
20 employment.

21 **A.** My name is Mark Miller. I've been a truck driver for
22 Wal-Mart for the last 22 years, since 1994.

23 **Q.** And what kind of driver are you? Private fleet driver?

24 **A.** Private fleet, yes.

25 **Q.** Out of which distribution center do you work?

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1 **A.** Red Bluff, California.

2 **Q.** And where is your residence, sir?

3 **A.** I live in Cottonwood, the next town north of Red Bluff.

4 **Q.** You said Cottonwood?

5 **A.** Cottonwood, yes.

6 **Q.** How far is Cottonwood from Red Bluff?

7 **A.** About 26 miles.

8 **Q.** Okay. And, sir, are you a member of the class of drivers
9 bringing this lawsuit against Wal-Mart?

10 **A.** No, I'm not a member. I opted out.

11 **Q.** And can you just tell us why you opted out of the lawsuit?

12 **A.** I disagreed with the premise of the lawsuit.

13 **Q.** Before joining Wal-Mart, did you drive trucks for other
14 companies?

15 **A.** Yes, I did. I've been driving for about 36 years.

16 **Q.** Always driving trucks?

17 **A.** Yes. Driving and -- for a time, I owned my own trucks as
18 well.

19 **Q.** And when you owned your own trucks, that was before
20 joining Wal-Mart?

21 **A.** Yeah. I owned my own -- I owned six trucks right prior to
22 joining Wal-Mart.

23 **Q.** And why did you apply to work at Wal-Mart as a driver?

24 **A.** Because I wanted a good stable career opportunity that had
25 benefits and, you know, vacation time and retirement. When you

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1 own your own business, you don't have any retirement. And my
2 wife was kind of telling me I needed to head in that direction.

3 Q. And please tell the jury why have you stayed with Wal-Mart
4 for 22 years?

5 A. I've stayed with Wal-Mart for 22 years because it's the
6 best truck driving job I've ever had by far. It's not even
7 close.

8 Q. And you have a family, sir?

9 A. Yes. I have a wife and three grown sons.

10 Q. And have you been able to support your family?

11 A. Yes. I raised my children, put all three of them through
12 college.

13 Q. And my questions will pertain to the class period, which
14 goes from approximately 2004 until October 2015.

15 Do you have that time frame in mind, sir?

16 A. Yes.

17 Q. Prior to October 2015, approximately, how much did you
18 earn per year as a driver for Wal-Mart?

19 A. Probably in the \$85,000 a year range.

20 Q. And besides driving, did you have any other role at
21 Wal-Mart?

22 A. I'm a driver mentor. I help train the new drivers when
23 they come on board.

24 Q. How long have you served as a driver mentor, sir?

25 A. Probably 15 years.

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1 Q. And in any given year, approximately how many drivers
2 would you mentor?

3 A. It depends on if Wal-Mart was hiring or not. I've
4 mentored seven or eight drivers in the last year.

5 Q. Okay. And, Mr. Miller, what does it mean to you to be a
6 driver mentor?

7 A. I believe in Wal-Mart and the Wal-Mart culture, and so the
8 reason that I mentor is that I want to preserve the culture and
9 train the new drivers on, you know, how Wal-Mart does business.

10 Q. Okay. So let's talk briefly about a day that starts out
11 at a distribution center. We'll say Red Bluff.

12 Do you have that in mind?

13 A. Yes.

14 Q. And tell us about the beginning of the day, starting with
15 paperwork and a hook.

16 A. Yes. When I come to work, I go in the office and I see
17 the driver coordinator and I get my paperwork with my load
18 assignments. I do a set run so I do the same run every day. I
19 go to the same stores.

20 And I get my paperwork from the coordinators and then I go
21 out to my truck and I go and I hook on to my trailer that
22 matches my paperwork and I do a pre-trip inspection of the
23 trailer to make sure that it's safe to take out on the road.

24 Q. And is getting the paperwork necessary for the hook?

25 A. Yes. It's part of the job. You can't do your job if you

1 don't have the paperwork, so I consider that to be part of your
2 daily duties.

3 **Q.** And specifically, is the paperwork necessary to know which
4 trailer to which to hook?

5 **A.** Yes. It would tell you the trailer number and, you know,
6 the destination of where the trailer is going to.

7 **Q.** And approximately how long does the paperwork process of
8 picking the paper up -- how long does that take?

9 **A.** Probably about 15 minutes.

10 **Q.** And you mentioned a pre-trip inspection. Tell us what
11 that entails and when that happens with respect to the hook.

12 **A.** Yeah. You would drive your tractor out. The paperwork
13 will tell you the trailer number and what zone in the yard the
14 trailer is in so you would drive to that zone and you would
15 hook on to the trailer and then you would hook up your air
16 lines and your lights and crank the landing gear up and then
17 you would make sure that everything was safe to go out on the
18 road.

19 **Q.** And in your experience at Wal-Mart, is the pre-trip
20 inspection an important part of the hook?

21 **A.** Yes. It's part of the job.

22 **Q.** And is it your understanding that with respect to the
23 pre-trip inspection, you're paid for that?

24 **MR. WAGNER:** Objection. Calls for a legal conclusion,
25 leading.

1 **THE COURT:** Sustained.

2 **BY MR. WONG:**

3 **Q.** Let me ask you a different question.

4 Is it your understanding that the pre-trip inspection is
5 part of the hook and depart?

6 **A.** Yes.

7 **MR. WAGNER:** Objection. Leading. Lacks foundation.
8 Vague.

9 **THE COURT:** Overruled.

10 You can answer.

11 **THE WITNESS:** Yes. I believe it is part of the hook
12 process.

13 **BY MR. WONG:**

14 **Q.** Okay. And same question with respect to the paperwork.

15 In your experience at Wal-Mart and in trucking, is the
16 paperwork part of the hook and depart?

17 **A.** Absolutely. You can't go out without paperwork. You're
18 not allowed to haul any freight without any paperwork.

19 **Q.** And you told us, sir, that you mentor other drivers?

20 **A.** Yes.

21 **Q.** And is the pre-trip inspection and the paperwork being
22 part of the hook, is that part of what you speak to and teach
23 other drivers?

24 **A.** Yes, it is.

25 **Q.** Okay. Let's -- so you hook and depart, you get out on the

1 road, you start your run.

2 You said you're doing a set run right now?

3 A. Yes.

4 Q. Okay. And how about before October 2015, did you do
5 different types of runs?

6 A. Yes. In the class period, I did all different kinds of
7 runs.

8 Q. Okay. So you arrive -- you arrive at a vendor. You've --
9 you've done loading and unloading at vendors many times, I take
10 it?

11 A. Yes.

12 Q. Okay. Do you give your time to -- do you give your time
13 to vendors?

14 A. No. There's no such thing as giving time. Your arrive
15 codes and your live loads is what pays you for the first 45
16 minutes at a vendor. After 45 minutes, then you go on the
17 clock.

18 Q. Okay. Well, let's take that one at a time.

19 I think you mentioned live load?

20 A. Yes.

21 Q. So very briefly, what happens with respect to a live load?
22 You're paid for that?

23 A. Yes.

24 Q. And as of October 2015, approximately how much were you
25 paid?

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1 **A.** I think it was 17.75. I'm not sure of the exact number.

2 **Q.** Okay.

3 **A.** It's gone up since then.

4 **Q.** So what happens with a live load?

5 **A.** You arrive at the vendor. You park your truck. You go in
6 the office and you give them your load number. Wal-Mart gives
7 us a load number. You give the people at the vendor the load
8 number and then they give you paperwork and then you give it to
9 the loader in the warehouse and then they assign you a door,
10 they tell you what door to back into, and you back -- you back
11 the trailer up to the door, and then the people in the
12 warehouse load the load on a live load. We don't physically
13 load the loads.

14 **Q.** Okay. And I'm being reminded by my partner, Mr. Edelman,
15 who has become very adept at putting this chart up there, you
16 will see in front of you, sir, Defense Exhibit 619. And I
17 believe that's been received into evidence.

18 So feel free -- and this, sir -- can you see it from where
19 you are?

20 **A.** Yes.

21 **Q.** If you can't, I can move -- Mr. Edelman can move it closer
22 because this is not a vision test. But you can see it, sir?

23 **A.** Yes.

24 **THE COURT:** It's also on the little screen.

25 **THE WITNESS:** Oh, right here.

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1 **MR. WONG:** Thank you, Your Honor.

2 **THE WITNESS:** I can see it just fine.

3 **BY MR. WONG:**

4 **Q.** So it's in front of all of us in many different ways.

5 So we were talking about live load and unload, but -- so
6 you're paid for a live load, but are you actually -- are you as
7 the driver -- are you actually doing the loading?

8 **A.** No, we're not. We're just waiting while they load or
9 unload.

10 **Q.** When you say "they load" --

11 **A.** The warehouse, the vendor would load the freight. Or if
12 you were live unloading at a store, the store associates would
13 unload the freight.

14 **Q.** Okay. Is there a policy or practice at Wal-Mart as to
15 whether drivers touch freight?

16 **A.** Yes. They do not want us touching freight.

17 **Q.** Okay. So during the live -- during the live load, what
18 kinds of things -- what kinds of things can you be doing as the
19 driver?

20 **A.** You can talk to your friends on the phone; you can hang
21 out and talk with other drivers that are there at the vendor;
22 you can eat something in your truck; you could take -- you
23 know, we have a sleeper so you could take a nap if you wanted
24 to. Use the restroom.

25 **Q.** You could take a nap during a live load?

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1 **A.** Sure.

2 **Q.** Would that potentially be a time for a ten-minute break?

3 **MR. WAGNER:** Objection, leading.

4 **THE COURT:** Sustained.

5 **BY MR. WONG:**

6 **Q.** Can you take a break?

7 **A.** Yes.

8 **Q.** And then live unload, same thing? Are you -- is the
9 driver touching freight?

10 **A.** No. We don't touch the freight. The store associates
11 unload.

12 **Q.** Can you do other things during a live load -- I mean, a
13 live unload?

14 **A.** You could probably go use the restroom. Probably want to
15 be there when they're unloading.

16 **Q.** And there's another pay code for arrive and drop. When
17 you arrive at a vendor, is that pay code relevant?

18 **A.** At a live load, it would just be an arrive, AR. Arrive
19 and drop would be when you arrive and drop a trailer. You had
20 a drop and hook, vendor --

21 **Q.** How about a stop? Would there be occasions where you
22 would be paid both a live load or unload and a stop or an
23 arrive?

24 **A.** No. You would be paid an arrive and a live unload or an
25 arrive and stop.

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1 Q. So you could be paid for more than one activity?

2 A. Yeah. Two. You're usually paid for two activities,
3 everything you do. An arrive and a hook or an arrive and a
4 live load or a live unload.

5 Q. Okay. And in your experience, does that typically cover
6 approximately the first 45 minutes spent at a vendor?

7 A. Yes.

8 MR. WAGNER: Objection. Leading. Move to strike.

9 THE COURT: Sustained.

10 Start again without leading the witness.

11 MR. WONG: Okay.

12 Q. Do you feel like you're giving up the first 45 minutes of
13 time at a vendor?

14 MR. WAGNER: Objection. Leading. Vague.

15 THE COURT: Sustained.

16 MR. WONG: Okay.

17 Q. Sir, what happens -- how do you get paid after 45 minutes
18 at a vendor?

19 A. You go on the clock.

20 Q. And tell us how that works.

21 A. On your trip sheet -- and also in the computers on our
22 trucks, they keep track of how long we're at a vendor or at a
23 store. And once you're at a vendor or a store more than 45
24 minutes, it automatically puts you on the clock, and the total
25 time at the vendor or the store is calculated, and minus the 45

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1 minutes, they pay you the difference in hourly pay.

2 Q. Okay. And referring you, sir, to Exhibit -- Defense
3 Exhibit 619, which is on the screen for Court, counsel, and
4 members of the jury, do you see that reflected here?

5 A. It would be unscheduled time, \$14 an hour.

6 Q. Okay. And if the wait time is exceptionally long, like
7 more than two hours, in your experience, how is that handled?

8 A. If you were at a vendor an extremely long amount of time
9 and it impacted your day's total earnings, the company would do
10 something that they call making you whole. They would make up
11 the difference to your average day's pay. I mean, if you were
12 at a vendor for, say, eight hours and, you know, we have the
13 14-hour clock and it caused you to lose drive time, there is an
14 instance where the company could make you whole.

15 Q. And how do they make you whole? How is that done?

16 A. They calculate how much you made for that entire day, and
17 if it's significantly less than your average day's pay, they'll
18 generate a T-pay, and they'll pay you the difference up to your
19 average day's pay.

20 Q. You mentioned T-pay. What's a T-pay?

21 A. That's generated by the driver coordinators. It's just a
22 form that they pay you extra money with.

23 Q. All right.

24 Your Honor, may I approach the witness?

25 THE COURT: You may.

1 **BY MR. WONG:**

2 **Q.** Sir, I'm handing you a photo marked Defense Exhibit 686,
3 which has been marked for identification, not yet received into
4 evidence.

5 Can you please tell us what this is, what this depicts?

6 **A.** The device on the left is called a pre-pass. It's a
7 device that allows us to bypass the truck scales.

8 **Q.** Sir, let me stop you there.

9 Your Honor, move admission of Defense Exhibit 686.

10 **THE COURT:** Any objection?

11 **MR. WAGNER:** No.

12 **THE COURT:** All right. It will be received.

13 (Trial Exhibit 686 received in evidence).

14 **MR. WONG:** Your Honor, may I publish?

15 **THE COURT:** You may.

16 **BY MR. WONG:**

17 **Q.** So you were telling us about the pre-pass, and so please
18 tell the jury, what's a pre-pass?

19 **A.** It's a device that there is some transponders when you
20 come near a truck inspection facility, and this will read the
21 information off of your truck and it will give you either a
22 green light or a red light. If you get a green light, you can
23 bypass the truck scales without going in.

24 **Q.** Okay. And I would note that on this picture, which has
25 been received into evidence as Exhibit 686, the pre-pass is

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1 next to a FasTrak, with which some people here might be more
2 familiar. Is a pre-pass somewhat similar to a FasTrak and how
3 it works?

4 **A.** Yes, it is.

5 **Q.** Okay. And do Wal-Mart drivers -- do Wal-Mart drivers all
6 get issued pre-passes?

7 **A.** Yes. I believe all the Wal-Mart trucks have pre-passes.

8 **Q.** Okay. In your experience, does that save -- does that
9 save time on DOT inspections?

10 **A.** Yes, it does.

11 **Q.** And weighing?

12 **A.** Yes. Because you don't have to go through the scales if
13 you get a green light.

14 **Q.** All right. I'd like now to turn to Department of
15 Transportation or DOT mandatory ten-hour breaks.

16 Do you have that topic in mind?

17 **A.** Yes.

18 **Q.** So you said now you're doing set runs, and with a set run,
19 do you take DOT breaks?

20 **A.** If I was to run out of hours on the road. The run is
21 calculated for me to get back to the distribution center and go
22 home every night, but if you had a breakdown or, you know, bad
23 weather conditions or whatever and you were to run out of
24 hours, then you would have a layover on the road, yes.

25 **Q.** Okay. But in your time at Wal-Mart between 2004 and 2015,

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1 were there years where you didn't do set runs, where you were
2 so-called running wild?

3 A. Yes.

4 Q. Please remind the jury, what does it mean to be running
5 wild?

6 A. That's just when you're in general dispatch and you just
7 kind of go wherever, you know, wherever the hours you have
8 dictate where you go to.

9 Q. Okay. And so you've taken -- you've taken your share of
10 DOT mandatory breaks?

11 A. Yes.

12 Q. And tell us about where you typically took your -- where
13 you typically took your DOT breaks?

14 A. Generally at a Wal-Mart store or a truck stop or maybe a
15 rest area. Usually you try to stay somewhere safe.

16 Q. Did you ever take a DOT break at home?

17 A. Yes.

18 Q. When you took a DOT break at home, did you have to ask for
19 permission beforehand?

20 A. No. I would just notify the company that I was laying
21 over at home and where the truck was.

22 Q. And when you notified the company, did you -- did you
23 notify a GTM?

24 A. Generally not because it was in the evenings when the GTM
25 had already gone home, so it was usually just an operations

1 manager.

2 **Q.** In your time at Wal-Mart between 2004 and 2015, was it
3 ever your understanding that you had to ask for permission to
4 take a DOT break at home?

5 **MR. WAGNER:** Objection. Leading.

6 **THE COURT:** Overruled.

7 You may answer, sir.

8 **THE WITNESS:** No. I was not aware that you had to ask
9 for permission.

10 **BY MR. WONG:**

11 **Q.** During your DOT breaks, did you have to stay with your
12 truck the entire time?

13 **A.** No. I did various different things on my DOT breaks.

14 **Q.** And I understand that you're a mountain biker.

15 **A.** Yes. I like to mountain bike.

16 **Q.** Did you ride a bike during your DOT break?

17 **A.** Yes, I did. I brought my mountain bike with me when I
18 used to run wild and I would mountain bike on my DOT layovers.

19 **Q.** Where did you store your mountain bike?

20 **A.** When we first had the cabovers, the Wal-Mart shop built us
21 racks on the back of the trucks to hang our bikes. So I would
22 hang my mountain bike on the back of the cab.

23 When they got the bigger trucks that have the stand-up
24 sleeper, then we would bring the bikes inside the sleeper with
25 us.

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1 Q. So Wal-Mart actually helped install a bike rack in your
2 cab or behind your cab?

3 A. Yes, they did.

4 Q. Are there bike trails in the places where you would go?

5 A. Absolutely. I knew where all the good bike trails were on
6 the places on my routes.

7 Q. And when you -- when you were running wild, did you
8 sometimes go to places where you had to family?

9 A. Yes. I have family in Sacramento, so when I laid over in
10 Sacramento, I would stay with family.

11 Q. Can you tell us who you knew in the Sacramento area?

12 A. I have a son and I have my mother-in-law, a couple of
13 nephews that live in Sacramento. I would visit them.

14 Q. Okay. So when you -- so you would actually take -- take a
15 layover in Sacramento away from your truck at a family member's
16 home?

17 A. Yes. I would park -- near their home, there was a Sam's
18 Club and a Wal-Mart, and I would park the trucks at the
19 Wal-Mart store or the Sam's Club and then they would come pick
20 me up.

21 Q. And did you have to ask anyone for prior permission to
22 spend a layover with a family member?

23 A. No. I didn't ask for permission. I just told them that I
24 was leaving the truck at the Sam's Club and I was going to stay
25 with my mother-in-law that night.

1 Q. Have you ever heard the term "baby-sitting freight"?

2 A. I have never heard that until now.

3 Q. Did you ever have any understanding that you were supposed
4 to stay with the truck and be a security guard during the --
5 during your DOT mandatory breaks?

6 A. No. I did not.

7 Q. You've been in the trucking industry for how long?

8 A. Thirty-six years.

9 Q. Have you ever heard of any other company who paid drivers
10 anything for a DOT layover?

11 MR. WAGNER: Objection. Relevance.

12 THE COURT: Sustained.

13 BY MR. WONG:

14 Q. Have you ever spent your layover in a hotel?

15 A. Yes.

16 Q. To take a layover in a hotel, let me ask -- let me just
17 ask it different ways.

18 To get reimbursed for the hotel and get layover pay, do
19 you have to ask for permission?

20 A. Yes. There had to be a circumstance where you would get
21 paid for the hotel and the layover. You know, I was sick on
22 the road with the flu one time, and I needed to be near a
23 restroom, so I called the company and told them that I was
24 sick, and they had me get a hotel room and they paid for the
25 hotel room and they paid the layover pay.

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1 Q. Okay. But if you wanted to stay in a hotel and just pay
2 for it yourself and get layover pay, did you have to get
3 permission for that?

4 A. No.

5 Q. Have you ever heard of a truck check?

6 A. No. I've never heard of that.

7 Q. Have you ever heard of safety managers knocking on your
8 door during a layover and making sure that drivers were in the
9 cab during a layover?

10 A. No. I've never heard that. And also that would be a
11 violation of DOT regulations to interrupt a driver on their
12 layover, so I don't think Wal-Mart would do that.

13 MR. WAGNER: Objection. Calls for a legal conclusion.
14 Move to strike.

15 THE COURT: I'll grant the motion to strike. It
16 wasn't calling for it, but it got a legal conclusion, so I'll
17 strike that.

18 BY MR. WONG:

19 Q. Sir, why are you testifying on behalf of Wal-Mart today?

20 A. Because I disagree with the premise of this lawsuit. I
21 think that Wal-Mart's a good company to work for. It's a good
22 job, and they've treated me very well over the last 22 years.

23 MR. WONG: Thank you.

24 One minute, Your Honor.

25 (Defense counsel confer off the record.)

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1 **BY MR. WONG:**

2 **Q.** Sir, I'm just going to lay the foundation for one document
3 and then we'll be finished.

4 Your Honor, may I approach the witness?

5 I'm handing you a chart I think we have seen before. It's
6 been marked for identification as Defense Exhibit 671. And I'm
7 handing you a glass of water as well.

8 **A.** Thank you.

9 **Q.** So with respect to this exhibit, 671, sir, does this set
10 forth the different ways in which Wal-Mart pays its drivers?

11 **A.** Yes.

12 **MR. WONG:** Your Honor, move admission of Exhibit 671.

13 **THE COURT:** Is there any objection?

14 **MR. WAGNER:** No objection.

15 **THE COURT:** Thank you. It will be received.

16 (Trial Exhibit 671 received in evidence)

17 **MR. WONG:** Your Honor, may I publish?

18 **THE COURT:** Yes.

19 **BY MR. WONG:**

20 **Q.** So, Mr. Miller, just now that the Court, counsel and
21 members of the jury can see this, I just want to reask the
22 question.

23 Does this set forth the different categories or buckets by
24 which Wal-Mart pays its drivers?

25 **A.** Yes.

1 Q. And I think you previously talked about unscheduled time,
2 and that -- and I think you referred to that as being on the
3 clock. Do you remember that testimony?

4 A. Yes.

5 Q. And please tell the jury the difference between
6 unscheduled time and scheduled time.

7 A. Scheduled time is when you have training or some kind of a
8 meeting that Wal-Mart schedules. And unscheduled time are for
9 things that happen out on the road like a flat tire or a
10 breakdown or being more than 45 minutes at a store or a vendor.

11 Q. And do you know what a grassroots meeting is?

12 A. Yes.

13 Q. What's a grassroots meeting?

14 A. A grassroots meeting is where management meets with the
15 drivers and we just kind of talk about the issues going on,
16 kind of air things out, and you could bring up any issues that
17 you might have with the management.

18 Q. Does Wal-Mart pay drivers for time spent at grassroots
19 meetings?

20 A. Yes, they do.

21 Q. What kind of -- what bucket does that fall in?

22 A. Unscheduled time -- or scheduled time? I'm sorry.

23 Q. Scheduled time.

24 A. Yes.

25 Q. Okay.

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1 All right. Thank you, Mr. Miller.

2 Nothing further, Your Honor.

3 **THE COURT:** Mr. Wagner?

4 **MR. WAGNER:** Yes, thank you.

5 **CROSS-EXAMINATION**

6 **BY MR. WAGNER:**

7 **Q.** Hi, Mr. Miller. My name is Butch Wagner. I'm one of the
8 attorneys for the class of truck drivers.

9 And it's obvious -- is it fair to say that you have a
10 different opinion or feeling than the other 839 truck drivers
11 that are part of this case about --

12 **MR. WONG:** Objection. Vague.

13 **BY MR. WAGNER:**

14 **Q.** -- about the issues in this case; correct?

15 **MR. WONG:** Objection. Vague. Calls for speculation.

16 **THE COURT:** Sustained.

17 **MR. WONG:** Lacks foundation.

18 **THE COURT:** Sustained.

19 **BY MR. WAGNER:**

20 **Q.** Sir, you said you didn't agree with the premise of the
21 case; right?

22 **A.** Yes.

23 **Q.** Okay. Have you read the lawsuit itself, what it's about?

24 **A.** No. I have a basic understanding.

25 **Q.** Who told you about what the lawsuit is about then that

1 created your understanding?

2 **A.** Other drivers. Probably guys that are in the lawsuit.

3 **Q.** Okay. So you haven't read the documents yourself, have
4 you?

5 **A.** No, I have not.

6 **Q.** Have you read any of the orders from the Court in this
7 case?

8 **MR. WONG:** Objection. Objection to references to
9 those documents, to the orders of the court.

10 **THE COURT:** Overruled.

11 You can answer that question.

12 **THE WITNESS:** No, I have not.

13 **BY MR. WAGNER:**

14 **Q.** So you don't know the rulings that have been made?

15 **A.** No, I don't.

16 **Q.** Okay. But you feel a loyalty to Wal-Mart; right? Is that
17 fair to say?

18 **A.** Yes.

19 **Q.** All right. Now, the opinions you've expressed in your
20 testimony, are those your -- those are your personal opinions;
21 right?

22 **A.** Yes, they are.

23 **Q.** They're not the opinions of the other drivers as far as
24 you know, are they?

25 **A.** Some of the drivers have a similar opinion to me, yes.

1 Q. Okay. And do you know who some of those drivers are?

2 A. Sure.

3 Q. All right. Do you -- so is it -- have you talked to any
4 of the 839 drivers that are a part of the case about their
5 opinions?

6 A. Yes, I have.

7 Q. Okay. And their opinions are different than yours; right?

8 A. They're varying, yes. I mean, there's three different
9 opinions from what I can tell from talking to dozens and dozens
10 of drivers in this case.

11 Q. Okay. Now, when you get paid, there's a record of what
12 you get paid for at Wal-Mart; right?

13 A. Yes.

14 Q. And your pay records set forth what it is you're actually
15 getting paid for; right?

16 A. Yes.

17 Q. Now, you mentioned that you're a -- you have a set route,
18 and a set route brings your -- you back to close to your home
19 at the end of every day; right?

20 A. Yes.

21 Q. So there's no -- so you are excused from the layover --
22 taking layovers in the cab because it's known that you take
23 your layovers at home. In fact, your route is set up to
24 accommodate that; right?

25 A. Yes. But in the time of the class, I've also -- in that

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1 time, I've run wild as well. I just currently happen to be on
2 a set run.

3 **Q.** Okay. So you said you ran wild and you said that at times
4 when you ran wild, you didn't get permission sometimes to take
5 your layover outside of the cab; correct?

6 **A.** Yes. I was not aware that you had to ask for permission.
7 I would just notify the company that I was laying over outside
8 of the truck.

9 **Q.** So you weren't aware of the policies that required you to
10 do so; huh?

11 **A.** No. I'm not aware of that policy.

12 **MR. WONG:** Objection. Objection. States facts not --
13 misstates facts.

14 **THE COURT:** If you put the word "any" in there, I will
15 let you ask him.

16 **MR. WAGNER:** Okay.

17 **Q.** Were you aware of any of the policies that required you to
18 get permission to take your layover somewhere other than the
19 tractor?

20 **A.** No. I was not aware that you needed permission and I've
21 never had anyone tell me that I needed permission. I do it --
22 I took layovers outside of the truck regularly and no one ever
23 told me that wasn't okay.

24 **Q.** Well, did you read the driver manuals on the issue?

25 **A.** No, I did not.

MILLER - REDIRECT / WONG

1 Q. Okay. Were those given to you at some point or made
2 available to you at some point during your employment?

3 A. Yes. I have one.

4 (Plaintiffs' counsel confer off the record.)

5 **BY MR. WAGNER:**

6 Q. Did you ever take your layover outside of the tractor --
7 and this is when you were running wild. Did you ever take your
8 layover outside of the tractor without notifying one of your
9 superiors that you were doing so?

10 A. No.

11 Q. Okay.

12 I don't have anything further. Thank you, Mr. Miller.

13 **THE COURT:** Mr. Wong, anything further?

14 **MR. WONG:** Just a few.

15 **REDIRECT EXAMINATION**

16 **BY MR. WONG:**

17 Q. Just a couple more questions.

18 Sir, are you aware of a sizeable number of drivers who are
19 opposed to this case?

20 A. Yes. I know several drivers that are opposed to the case.

21 Q. And did any Wal-Mart lawyer ever try to talk to you before
22 you decided to opt out on your own?

23 A. No. I got -- I received something in the mail from the
24 plaintiffs' lawyers, and it said if I wanted to opt out, you
25 fill out the bottom of it, you cut it off, and you mail it in.

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1 And I did that a long time ago. Didn't have anything to do
2 with lawyers.

3 **Q.** All right.

4 Thank you, sir.

5 **THE COURT:** May the witness be excused?

6 **MR. WONG:** Yes, Your Honor.

7 **MR. WAGNER:** Yes, Your Honor.

8 **THE COURT:** Thank you very much, sir. You're excused.

9 All right. The defendants may call their next witness.

10 **MR. EDELMAN:** Your Honor, would now be an appropriate
11 time to take the morning break?

12 **MR. SALTZMAN:** Before the next witness, before the
13 expert, we have some issues to discuss.

14 **THE COURT:** Okay. Ladies and gentleman, we will take
15 our morning break. If you would be ready to come back, please,
16 at 10 minutes until 10:00. In the meantime, please don't
17 discuss this matter with each other or anyone else. Don't make
18 up your minds. You've not heard all the evidence yet.

19 (Proceedings were heard out of presence of the jury:)

20 **THE COURT:** To discuss with each other or with me?

21 **MR. SALTZMAN:** I think together, the two of us first
22 and then with me.

23 **THE COURT:** All right. Well, let me know then.

24 (Recess taken at 9:39 a.m.)

25 (Proceedings resumed at 10:01 a.m.)

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1 (Proceedings were heard out of presence of the jury:)

2 **THE COURT:** Are we ready?

3 **MR. SALTZMAN:** Ready to talk, yes, sir. Thank you.

4 **MR. EDELMAN:** Thank you, Your Honor. So, Your Honor,
5 I gave Mr. Saltzman earlier this morning a set of the slides
6 that I plan to cover with Dr. Walker. And he asked me to
7 revise one of the slides, which I did, and we have been through
8 his other objections and I think resolved them, except he still
9 has two --

10 **MR. SALTZMAN:** 3, 17, 18, and 19.

11 **MR. EDELMAN:** So can I give you a set, Your Honor.

12 **THE COURT:** Yes.

13 **THE CLERK:** Are these going to be marked in evidence?

14 **MR. EDELMAN:** They will be marked for identification.

15 **THE COURT:** So what's the problem?

16 **MR. SALTZMAN:** On No. 17, Your Honor, if the witness
17 testifies to all of this, if he testifies, then I think if he
18 actually testifies to this, then that would be appropriate to
19 then show to the jury, but until he testifies to it, it's just
20 like asking a long, leading question, "Are these all of your
21 conclusions," and he tells him what his conclusions are as he
22 puts them up.

23 At the end of the day, if the expert testifies to these,
24 then I'm sure it will be fine as a summary of his conclusions,
25 but he hasn't testified to that yet.

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1 **THE COURT:** These are all demonstratives, I take it.

2 **MR. EDELMAN:** Yes. Your Honor, what these are, we are
3 talking two very thick reports. These are all lifted directly
4 from the report, and it's obviously he could look at his report
5 and look at all his subtitles and read them to the jury. I'm
6 just trying -- this summary, which he will testify to, is just
7 demonstrative to try to get through it more quickly.

8 **THE COURT:** The objection to that is overruled.

9 What's the next one?

10 **MR. SALTZMAN:** No. 18, Your Honor, the next one in
11 order, what the driver said at the depositions.

12 This is literally the expert coming in and doing a
13 deposition summary of testimony that has all kinds of problems
14 with the underlying testimony itself. As we have been
15 discussing throughout the trial, there is assumptions on legal
16 conclusions; there is assumptions on factual conclusions. And
17 the expert is now testifying or trying to testify as an expert
18 about what people -- how they interpreted questions that he
19 can't testify to their interpretation of these issues. These
20 are actual legal issues that the jury needs to decide. So
21 having him come in and just testify, especially on the third of
22 those categories -- even the second, the second category,
23 "Spent an entire layover away from the truck," we have no
24 foundation there --

25 **THE COURT:** In the report, did you attach -- I mean, I

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1 don't know how he is going to make these calls, but did he
2 attach to his report the deposition transcripts that he added
3 up to come to these numbers?

4 **MR. EDELMAN:** This is sourced -- and we did this on
5 purpose. This is sourced in the bottom right corner to
6 Appendix 4 of his report, and this really -- it's a surprising
7 objection --

8 **THE COURT:** I want to know, did you attach the depo
9 transcripts so that you could go back and say, "Well, do I
10 agree that this person said I spent a portion of" -- and this
11 is where he said that for 85 percent of the time.

12 **MR. EDELMAN:** I don't remember if the deposition
13 transcripts are attached, but he will say that he read all the
14 transcripts in the same way that Dr. Phillips -- that was the
15 essence of what Dr. Phillips did, is he said his team surveyed
16 the deposition testimony, and then he gave, you'll recall, what
17 he thought were averages or he did his Monte Carlo thing based
18 on a combination of the surveys and the deposition testimony.
19 That was the essence of what Dr. Phillips did.

20 This is also what our witness did. And so this analysis
21 is very similar to what they heard already from Dr. Phillips.
22 And I think if he wants to cross-examine the witness on whether
23 he thinks this is appropriate or whether he thinks it is
24 founded or not -- but it's directly from his report. All the
25 data is there. And it's exactly what their witness did.

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1 **MR. SALTZMAN:** Your Honor, it's very different,
2 completely different from Dr. Phillips, who coded time. He
3 looked at depositions and looked at time spent on tasks --

4 **THE COURT:** He can testify to whatever he can testify
5 to and they can object to whatever they can object to, but this
6 I don't think he should display.

7 **MR. SALTZMAN:** We would have the same concern about
8 No. 19, Your Honor, which is even more embedded with legal
9 conclusions as to what a paid break is versus an unpaid break.
10 This witness is about to testify in his report and in his
11 deposition, he said unambiguously, "I'm not a legal expert; I'm
12 not a lawyer; I'm not here to offer legal opinions." And this
13 chart is embedded with a legal opinion as to what is paid rest
14 break versus an unpaid rest break, which is an ultimate issue
15 in the case.

16 **MR. EDELMAN:** It's not, Your Honor. It goes directly
17 to the conflicting testimony in the case. It rebuts
18 Dr. Phillips about whether drivers were paid for time. It's
19 not legal. It's a question of were they taking rest breaks
20 during a time when they were being paid. There has been all
21 sorts of testimony about that, and this is what an expert
22 classically does, is looks at the evidence and tabulates it.
23 It is just what Dr. Phillips did and this is the other had side
24 of the coin.

25 We put Dr. Phillips' assumption on the left of this chart.

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1 He testified that drivers never took rest breaks on paid time,
2 that was his assumption. And so we're challenging -- we are
3 rebutting the assumption that Dr. Phillips made through this
4 evidence, which is directly sourced to Dr. Walker's report.

5 **MR. SALTZMAN:** That is completely contrary to what has
6 been done here. Dr. Phillips did not testify to what would be
7 a paid rest break or unpaid rest break.

8 **THE COURT:** I'm not going to allow this one either for
9 the same reason. He can testify, but I'll listen for
10 objections.

11 **MR. SALTZMAN:** Your Honor, if I could go back to No.
12 17. If you will recall, when Dr. Phillips testified, we did
13 not and we were not permitted to put up on the board anything
14 until he actually testified.

15 For example, all the numbers, we went through the numbers,
16 put it up -- put them up, had him testify to them, and
17 Mr. Artenian wrote that down as it came out. And now this
18 witness is being allowed to basically --

19 **THE COURT:** Well, I'm going to allow this.

20 **MR. SALTZMAN:** Okay. So you're done with it.

21 Now, as a global issue, now that we have your guidance on
22 these last two exhibits, as a global issue -- and this is a
23 concern I raised with Mr. Edelman -- Dr. Walker, his report is
24 replete with legal conclusions and legal arguments. I just --
25 counsel has said he doesn't plan to go there. He recognizes

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1 that's not his role, but I'm just letting you know that I'm
2 going to have to do a lot of objecting if he goes to legal
3 arguments and legal conclusions. I want you to know that that
4 at least may be coming so we know what we are dealing with
5 here. But I think we have your guidance.

6 By the way, an example of that --

7 **THE COURT:** I don't need an example.

8 **MR. SALTZMAN:** Well, it's a specific issue I asked
9 Mr. Edelman about, and he thinks he may go there, which is two
10 paragraphs in his report, on again the rest break issues.
11 These -- the witness said these unpaid rest break analyses
12 discussed have nothing to do with paid rest breaks.

13 So, again, we're getting an expert witness, who is not an
14 expert on the law or meal breaks, and he said that, he said he
15 has no idea, testifying as to what the difference is between an
16 unpaid rest break and a paid rest break, an ultimate issue in
17 this case, perhaps, and I need -- I don't think Mr. Edelman
18 should be entitled to go there.

19 **MR. EDELMAN:** Can we -- we just need to take -- if he
20 has an objection at the time. I have no intent of soliciting
21 legal opinions from this expert.

22 **MR. SALTZMAN:** Then we will see how --

23 **THE COURT:** What occurs to me from looking at one of
24 those charts that we're not going to use, to a lay observer,
25 it's very confusing to talk about paid rest breaks, unpaid rest

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1 breaks or rest breaks on paid time.

2 I suspect that you folks mean very different things when
3 you talk about that because when you say rest break on paid
4 time, what you mean is well, we are including it all in the
5 this and the that and they would have had to hang out anyway so
6 they will take a rest break then. I expect what he is talking
7 about is something very different.

8 I think the witness is going to have to be very precise
9 when he says whatever he says so that you don't just start
10 assuming things about which there is vast disagreement.

11 **MR. EDELMAN:** Sure. I'm going to just spend a moment
12 with the witness to tell him which slides we're not covering.
13 If you would just give me two minutes, Your Honor.

14 (Off the Record)

15 **THE COURT:** Are we ready?

16 **MR. EDELMAN:** Yes, Your Honor.

17 (Proceedings were heard in the presence of the jury:)

18 **THE COURT:** All right. The defendants may call their
19 next witness.

20 **MR. EDELMAN:** Thank you, Your Honor.

21 Wal-Mart will call to the stand Dr. Jonathan Walker.

22 **THE CLERK:** You may be seated.

23 **THE WITNESS:** Thank you.

24 **THE CLERK:** You're welcome. I'll take your picture.

25 Raise your right hand.

WALKER - DIRECT / EDELMAN

JONATHAN WALKER,

called as a witness for the Defendant, having been duly sworn,
testified as follows:

THE CLERK: State your name for the record.

THE WITNESS: Jonathan Walker.

THE CLERK: And that's Jonathan with an A?

THE WITNESS: J-O-N-A-T-H-A-N.

THE CLERK: Thank you.

THE COURT: Mr. Edelman.

MR. EDELMAN: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. EDELMAN:

Q. Dr. Walker, good morning.

A. Good morning.

Q. Good morning, ladies and gentleman of the jury.

Dr. Walker, can you tell us a little bit about your
educational and professional background?

A. Yep. I have a Bachelor's in economics from Berkeley. I
have a Ph.D. in economics from MIT.

During the last year of my time when I was working on my
dissertation, I worked at the Federal Reserve Bank of Boston,
which is part of the regulatory structure for banks.

After that, I went to work for Monitor Company, which is a
strategy consulting firm. Our clients were Fortune 500
companies and their equivalent, privately held and

1 international counterparts.

2 In 1990, I joined Economists Incorporated, which is an
3 economic consulting firm. At that time, it had one office in
4 Washington, DC, and over the years, I've gone through different
5 jobs there.

6 When I was hired, I was senior economist. I was promoted
7 to vice-president and then to senior vice-president and then to
8 principal and now I'm the president and chief executive officer
9 of Economists Incorporated.

10 **Q.** And is one of your areas of expertise as an economist the
11 economics involved in labor?

12 **A.** Yes. As a graduate student, I took courses in labor
13 economics. That was one of my areas of emphasis. I also
14 studied statistics and econometrics and the application of
15 statistics to economic data.

16 **Q.** Can you tell us or tell the jury a little bit more about
17 what Economists Incorporated does.

18 **A.** Sure. Economists Incorporated has approximately 35 Ph.D.
19 economists, roughly 70 to 80 staff in total. We have a lot of
20 different service offerings, many of them are sort of unrelated
21 to the tasks here, but one of the things that is related is
22 work that Economists Incorporated does that relates to labor.

23 So we work with companies that want to know whether their
24 pay policies are having a disparate impact on minorities or on
25 women, you know, make sure that the pay policies are not

1 discriminating against different demographic groups. We help
2 them to understand whether their planned promotions are
3 favoring one group or another, whether their planned reductions
4 in force are going to have a negative impact on one group or
5 another.

6 We work with companies during litigation or individuals
7 who are in litigation, such as here where there may be lawsuits
8 about discriminatory practices or failure to adhere to wage
9 hour laws. That's one of the practice areas that is most
10 relevant to what is going on here today. Because, as I said,
11 we also are involved in a host of other service areas that are
12 not related to litigation.

13 **Q.** Just briefly, give the jury a sense of what those other
14 areas of economics are that your firm gets involved in.

15 **A.** Sure. Antitrust analysis. So when companies merge,
16 competitors or the companies themselves or their customers may
17 want to know what the impact of the merge is going to be on
18 competition so how is it going to affect the prices that they
19 have to pay.

20 We do a lot of work with auctions around the world.
21 Governments now sell off the rights to use radio spectrum and
22 radio frequencies for cellular telecom, for television or for
23 radio. And so we work with telecommunications companies
24 helping them to devise strategies for how to participate in
25 auctions for these things.

WALKER - DIRECT / EDELMAN

1 We do a lot of work in regulation in general, helping
2 companies to understand how proposed business regulations are
3 going to affect the way they do business and also helping them
4 to understand what regulations -- well, basically how they're
5 going to affect the way they do business.

6 We do some tax-related work.

7 So there are a wide range of things that we do in addition
8 to sort of litigation-related stuff.

9 **Q.** So it sounds like a lot of what your companies does is not
10 necessarily litigation related?

11 **A.** That's correct.

12 **Q.** All right. And how many offices does Economists
13 Incorporated have?

14 **A.** We have three offices. One here in San Francisco. Our
15 headquarters is in Washington, D.C. and an office in Florida.

16 **Q.** You're from the San Francisco office?

17 **A.** I -- I live here in San Francisco, but I travel back to
18 Washington every month. And I go to the Florida office
19 occasionally as well.

20 **Q.** Okay. And how many -- how many Ph.D. economists do you
21 have on your staff?

22 **A.** It's approximately 35. It's sort of -- there are a couple
23 of people that it sort of depends on how you count them,
24 whether you count them as employees or not, but it's
25 approximately 35.

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1 Q. All right. And as president, do you spend part of your
2 time managing this company?

3 A. Yes. About half of my time is spent managing the company.
4 About half of my time is spent providing consulting services
5 myself.

6 Q. Okay.

7 Tell us -- you mentioned it, but tell us -- or you
8 mentioned it a little bit in passing, but give us, if you
9 would, particular examples of your consulting work, you, in the
10 labor area since you've been at Economists Incorporated.

11 A. Sure. Right now, I'm involved in two cases on behalf of
12 the Chicago Teachers Union. So they are challenging some of
13 the employment-related practices by the Chicago School Board,
14 and they're suing them for them, claiming that they had had a
15 disparate impact on African American teachers. And I'm working
16 with them on those.

17 I recently testified in a wage hour case, I mean, another
18 lawsuit that's involving California wage hour laws.

19 I've worked on behalf of the Department of Labor, trying
20 to make sure that trustee's for pensions were investing pension
21 plan assets in a way that benefited the beneficiaries and that
22 was true to their fiduciary duties.

23 I have worked on behalf of individuals in cases where
24 they've alleged discriminatory practices by their employees,
25 sex discrimination and race discrimination. Those --

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1 Q. Were you representing the plaintiffs in cases like that?

2 A. Yes. Well, the Chicago Teachers Union case is the
3 plaintiff's side, and I have worked on behalf of plaintiffs in
4 discrimination cases as well.

5 The Department of Labor cases were not litigation
6 matters -- actually, one of them did turn into a litigation
7 matter, and the Department of Labor was the plaintiff in that
8 action as well.

9 Q. So you do some of your work on the plaintiff's side and
10 some of it on the defense side?

11 A. Yes. That's right.

12 Q. Did I understand from your last answer, that you are also
13 retained by the Government as an expert?

14 A. I have been, yes.

15 Q. And what would be examples of that?

16 A. Well, the Department of Labor was an example of that.
17 There were other examples that are outside of the labor field,
18 so I'm currently working for the United States in a lawsuit
19 against Lance Armstrong related to his contract with the postal
20 service when he was the rider for the Tailwind team in the Tour
21 de France.

22 The United States government is suing Lance Armstrong for
23 alleged fraud related to that, and I'm the Government's damages
24 witness in that litigation. So I was hired by the U.S.
25 Attorney for the District of Columbia and also the Department

1 of Justice.

2 There have been other cases where I've worked on behalf of
3 the United States government as well where the United States
4 government has been sued, and I've helped them to measure what
5 damages actually were under the assumption that the Government
6 was wrong, and I have been retained to give opinions about
7 damages on behalf of the Government.

8 **Q.** Okay.

9 And are you a member of any professional associations?

10 **A.** Yes, I am.

11 **Q.** Could you please tell the jury which ones.

12 **A.** I'm a member of American Economics Association, the
13 Western Economics Association, the American Law and Economics
14 Association, the Industrial Organization Society, the Society
15 of Labor Economists.

16 And also the American Bar Association antitrust section
17 allows affiliate members who are not lawyers because antitrust
18 has a very strong and deep economics part to it, and so I'm an
19 affiliate of that.

20 **Q.** By the way, that notebook you have in front of you --

21 **A.** Yes.

22 **Q.** -- can you just tell the jury what that is.

23 **A.** Sure. This is a copy of the two expert reports that I
24 prepared in this case, the two expert reports that Dr. Phillips
25 prepared in this case, the expert reports that Mr. Garcia

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1 prepared in this case, and also two slides that contain some
2 calculations that I did.

3 Q. Okay. So we'll get to that later.

4 Have you ever given expert testimony in court?

5 A. I have.

6 Q. How many times?

7 A. Fourteen times.

8 Q. All right. Have you been recognized in court as an expert
9 before?

10 A. Yes, I have.

11 Q. How many times?

12 A. Fourteen times.

13 Q. Okay. Okay. And in what fields have you been qualified
14 as an expert in your previous testimony?

15 A. In economics and in statistics.

16 Q. All right. So I want to -- I know there is a lot of
17 detail in your reports and a lot of time that went into your
18 work. I want to start, not by getting into the detail, but by
19 giving the jury the big picture --

20 A. Yes.

21 Q. -- on what you've done.

22 A. Yes.

23 Q. Okay. And then we're going to get into the underlying
24 detail.

25 A. Yes.

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1 Q. So what were you retained to do in this case?

2 A. Well, initially I was asked to review data sets that
3 Wal-Mart had, so computer records that Wal-Mart had, to try to
4 test the plaintiffs' theory of this case to investigate whether
5 there was such a thing as a typical day for a truck driver to
6 try to ascertain whether using the data that Wal-Mart had, one
7 could determine reasonably accurately for people that you
8 didn't have real information about how frequently they engaged
9 in the tasks that, you know, are at issue here. And when they
10 did do those sorts of things, how often did it tend to take.

11 So my initial task was just to help Wal-Mart and its
12 counsel understand whether the data that Wal-Mart had in
13 computer format was consistent with the idea of there being a
14 typical day, a typical set of experiences, and that was sort of
15 the first thing that I was asked to do.

16 Q. Now, there has been a lot of testimony in this case and a
17 lot of questions asked of drivers, is there such a thing as a
18 typical trip or a typical day.

19 Are you going to be testifying as to the importance of
20 that answer?

21 A. I certainly will be talking about how that relates to a
22 separate issue of loss and how it measures loss and, yes,
23 that's the case.

24 Q. Okay. And when you were analyzing -- asked by Wal-Mart to
25 analyze the data, were you looking at it in terms of whether

1 issues in this case could be resolved through application of
2 any kind of a formula?

3 **A.** Yes. I mean, the reason to look at this was to determine
4 whether one could use a formula or averages for some smaller
5 group of people to draw reasonable conclusions about how often
6 the 800 or so drivers about whom we know nothing -- about how
7 often they engaged in tasks and about how frequently or how
8 long it tended to take them when they did.

9 So, yeah, the point was to determine, you know, whether or
10 not one could reasonably and accurately draw conclusions about
11 all 800 people that aren't here based upon the few people about
12 which you knew something.

13 **Q.** I wish Ms. Martinez were here today so she could see me
14 stealing a page from her book. But let me just summarize very
15 broadly your first task you told us about. You looked at the
16 data in the case and you tried to determine whether it could be
17 analyzed on a class-wide basis; is that correct?

18 **A.** Yes, it is.

19 **Q.** Okay. Was there a second thing that you were asked to do?

20 **A.** Yes.

21 **Q.** What was the second thing?

22 **A.** Over time, the project expanded and I was ultimately
23 asked to review the analyses by Dr. Phillips and Mr. Garcia and
24 to review the data that they relied upon, review the methods
25 that they used and to develop an opinion of my own about

1 whether their ultimate estimates and results were reliable and
2 reasonable and reasonably accurate.

3 Q. Okay. So the second thing that you were asked to do was
4 to look at the work that Dr. Phillips, Mr. Garcia, and
5 determine whether their work was reasonably accurate; is that
6 correct?

7 A. That's correct.

8 Q. Let me step back for a second.

9 In terms of the first point that you told us you were
10 asked to do, which was to analyze the data in the case or the
11 data set, I think you might have said, is that, as you
12 understand it, the same data that was given to Dr. Phillips?

13 A. Yes. In fact, the data I had had Bates numbers on it,
14 which means it was part of the discovery record.

15 Q. And what kind of data was that?

16 A. There were several different data sets that we looked at.
17 The biggest one and the one we did most of the work with was
18 what I think has been called here at trial the payroll data.
19 Sometimes I call it dispatch data, but they are the same thing.

20 These are computerized records that Wal-Mart kept related
21 to each of the trips by all of the class members throughout the
22 class period. And so each record in the payroll data would
23 have information about the length of the trip in miles, the
24 driver that did the trip, the number of different activities
25 that occurred. By activities I mean drop, hook, arrive,

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1 whether there were layovers, and how much the driver was paid
2 for that particular trip.

3 So that was the dispatch/payroll data. There were also --

4 Q. Let me stop you there.

5 A. Sure.

6 Q. So that dispatch or payroll data that you were provided,
7 how far back did that go?

8 A. That covered the entire class period. So the data that I
9 had went back to October 2004. It's possible we might have had
10 some earlier, I don't recall, but it started at least in
11 October 2004 through after the end of the class period.

12 Q. All right. And I think I interrupted you. You were going
13 to explain about other data that you analyzed.

14 A. Sure. Yes. There were ESI data. Those are the data from
15 the onboard computers. We had that. We did some work with
16 that.

17 There were T-pay data, so there were several data sets
18 that showed instances of T-pays, which I think there has been
19 some discussion about here.

20 There were -- later there were the Gasboy data that
21 Dr. Phillips has talked about. These related to instances
22 where trucks were fueled at Wal-Mart distribution centers.
23 There were the DOT/CHP data that Dr. Phillips also talked
24 about, which were records of instances where people had
25 roadside inspections. They're called DOT/CHP because they are

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1 inspections by the California Highway Patrol. They actually
2 did it, but it's to ensure that the drivers were complying with
3 Department of Transportation regulations, so we had those data.

4 There may have been other data sets that I'm not
5 remembering right now, but those were the main ones that we
6 worked with.

7 Q. And you just made a reference to some of the things that
8 have been discussed here. You are referring to the trial?

9 A. Yes.

10 Q. Tell the jury how you know what has been discussed in the
11 trial.

12 A. I've been -- well, there have been transcripts of the
13 testimony and the questions on a daily basis. And so I've read
14 all of the transcripts which were available -- I don't have
15 yesterday's, but I read all of the transcripts that were
16 available through last Thursday of the trial.

17 Q. So you've read the testimony from the various drivers on
18 both sides of the case or at least -- if you didn't have
19 yesterday yet you haven't heard from the drivers that Wal-Mart
20 called. But you read all of the drivers that the plaintiffs
21 called?

22 A. Yes.

23 Q. All right. And you read Dr. Phillips' testimony?

24 A. Yes, I did.

25 Q. And Mr. Garcia's testimony?

1 **A.** Yes, I did.

2 **Q.** Okay. And, again, I want to step back and ask you as an
3 economist, without reference in particular to the work that
4 Dr. Phillips did in this case, but as a general matter, do you
5 have any problems with economists using data to calculate
6 estimates about information or data that you don't have?

7 **A.** No.

8 **Q.** In other words, using information to draw conclusions or
9 extrapolate to a larger set of data?

10 **A.** No. I mean, that's the standard thing that economists do,
11 is try to use data that you have to draw conclusions or to
12 understand information that you don't have. And it can include
13 extrapolating, which is, you know, looking at a small group of
14 information, a sample, and drawing conclusions about a larger
15 population that the sample is drawn from.

16 So, you know, looking at one group of people, a small
17 group of drivers, and trying to draw conclusions about drivers
18 that aren't there, that's one type of instance where that
19 happens.

20 But also trying to determine information about the same
21 group of people, but things you can't observe about those same
22 group of people.

23 So it's a common practice. It's one of the things that we
24 are trained to do. We spend a lot of time developing tools to
25 try to do that.

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1 So that general idea, I have no qualms about, but one of
2 the things that economists need to do is to make sure that when
3 they're doing that sort of thing, that the data that they are
4 relying on, the data that they do have is reliable, and so part
5 of doing that properly is making sure of that, and also making
6 sure that the tools that you're using to draw conclusions are
7 reliable, that you are using them correctly, that you're not
8 being -- they're not using those tools invalidly.

9 **Q.** And without getting into it quite yet, is that one of the
10 things you are going to testify about today, whether the work
11 of Dr. Phillips relied on data that you consider to be
12 reliable?

13 **A.** Yes.

14 **Q.** Now, you mentioned the trial testimony that you have read
15 in this case through last Thursday. Have you reviewed
16 deposition testimony in this case?

17 **A.** Yes, I have.

18 **Q.** All right. And tell the jury what you have reviewed.

19 **A.** Sure. I've read -- reviewed tens -- I don't know exactly
20 how many deposition transcripts of drivers. I would -- I would
21 estimate it's around 50 or 60 or so.

22 There were 40 drivers that we're going to talk about in a
23 little more detail, actually 39 plus one who wasn't there for
24 very long. We're going to talk about that group in some
25 detail, and I read theirs.

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1 There were transcripts from the named plaintiffs. I think
2 there are nine of those. So that's 49. Forty-eight if you
3 count that 39 minus 1.

4 I have also reviewed transcripts of Wal-Mart
5 representatives.

6 And I think those are the major groups of deposition
7 transcripts that I've reviewed in connection with my work in
8 this case.

9 **Q.** All right. And I know we'll get to it later.

10 Dr. Phillips testified about 40 depositions and the process
11 that was employed with respect to that. You just said 39.
12 Tell us what you meant by that.

13 **A.** Sure. I mean, we're going to probably get into this in
14 more detail, but 40 people were selected by this process that
15 was supposed to be random, and of those 40, they were then
16 going to be given a questionnaire to fill out. And it had to
17 do with their experiences at Wal-Mart. And one of the 40
18 basically just wrote his name at the top of the questionnaire,
19 and then later when he was asked, he said, "Well, I only worked
20 for Wal-Mart for a day or so. I don't remember how long it
21 actually was." So he never actually ended up driving trucks.

22 So there is only information about how frequently people
23 engage in tasks and such for 39 people. It's not a full 40.
24 His transcript, I don't really remember it in great detail, but
25 there wouldn't be much in it other than "yes, this is my name,

1 yes, I got the subpoena. No, I have nothing to add."

2 Q. All right. And were you also asked in addition to
3 assessing the work of Dr. Phillips to assess the work of
4 Mr. Garcia?

5 A. Yes, I was.

6 Q. And -- all right. So let's now -- now let's get the
7 bite-size conclusions.

8 A. Sure.

9 Q. And then we're going to go into the detail.

10 A. Sure.

11 Q. Okay?

12 But again on a macro level, can you tell us what your
13 conclusions were regarding your first task, which was to look
14 at the data in the case and to determine whether it was similar
15 enough that it could be analyzed on a class-wide basis for all
16 the drivers, or whether it was -- and therefore under a
17 formula, or whether it was too different from driver to driver
18 and did not lend itself to that.

19 MR. SALTZMAN: Objection. Leading, Your Honor.

20 THE COURT: It's preliminary.

21 Don't lead him. But overruled.

22 THE WITNESS: The -- the data -- the analysis, the
23 computer analysis that we did showed to me that the drivers'
24 experiences were way too different from person to person. They
25 were way too dissimilar to be able to determine through

1 formulas or through sort of representative individuals and
2 extrapolation on a reliable basis what individualized losses
3 were in this case.

4 There were -- people's experiences as represented in the
5 data were just way too different from person to person and day
6 to day for you to be able to determine for the class as a whole
7 how frequently people did these various things and how long it
8 tended to take without going down to a very granular level and
9 getting additional information from each individual person one
10 by one.

11 **BY MR. EDELMAN:**

12 **Q.** And what did the data that you analyzed -- I assume there
13 were others in your office working with you as a team?

14 **A.** Yes. I had a team of people that were working with me.

15 **Q.** What did the data say about whether there is such a thing
16 as a usual trip for a Wal-Mart fleet driver?

17 **A.** The data said that there were not. There was no such
18 thing as a usual trip or a typical trip, so the trips would
19 vary from day to day, from person to person. And as the trips
20 varied, the Wal-Mart data, plus additional data that was
21 developed later, put together, suggested that on a day-to-day
22 basis, people would spend different amounts of time on these
23 different tasks, the numbers of times on a given day they would
24 have to engage in them would vary, and when you looked at
25 different people. One person on average would not be the same

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1 as anybody on average. It was really disparate.

2 And so it's really important for trying to estimate loss
3 for the people that we don't know, the people that have said
4 nothing, the 800 people about whom we know nothing at all, that
5 based on the people that we do know, there is just a wide
6 variety and people just aren't average.

7 **Q.** So is that important in this case? And if so, why?

8 **A.** It's important because the -- the plaintiffs and
9 Dr. Phillips are trying to assess, you know, how frequently did
10 people do these things, wash their trucks, or how frequently
11 did they take rest breaks or, you know, the other activities
12 based on either just an assumption that everybody does it a
13 certain amount of time or based on some sorts of averages from
14 some group of people who have answered questions about those
15 sorts of things.

16 And if it turns out, as it did, that, yes, there is an
17 average amount of time that people do these sorts of things,
18 but it's all over the map from person to person, so nobody
19 actually does it the average amount of time. Then when you
20 extrapolate, when you try to use this average to say well,
21 everybody else is average, on an individual basis, you are
22 going to be way off from person to person to person.

23 Even for the 40 people who were asked these sorts of
24 questions, they weren't average. So you could calculate their
25 average, you could take all 40 responses, add them all up and

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1 divide by 40, but the number that you got was never
2 representative of what any of those 40 people actually did. It
3 would either grossly overstate the amount they did or grossly
4 understate the amount they did. So it really wasn't
5 representative or illuminating about -- even the averages
6 weren't illuminating even about the 40 people about whom you
7 knew something.

8 And what you're trying to do or what Dr. Phillips has done
9 is he has taken these averages and he has tried to apply them
10 to 800 people about whom he knows nothing at all.

11 **Q.** Okay. So just so we have it all in mind, and you
12 mentioned it a little bit ago when you talked about the 39
13 people who were deposed and who filled out a survey -- but just
14 so we all have it in mind, can you remind us and describe
15 briefly what it was Dr. Phillips did in this case.

16 **A.** Yes. At the highest level, what Dr. Phillips did is
17 develop estimates of loss, so how much pay was lost supposedly
18 because people did these tasks and weren't paid for them.

19 And to do that, you know, he didn't know how frequently he
20 did them. Right? He didn't know how long it took.

21 So for some tasks, he just assumed, well, let's just
22 assume it takes 15 minutes all the time. But for others, he
23 developed this sample, and he -- he, as he said, he took all
24 840 class members --

25 **MR. SALTZMAN:** Objection. Misstates Dr. Phillips'

1 testimony.

2 **THE COURT:** I'm sorry. What?

3 **MR. SALTZMAN:** Misstates Dr. Phillips' testimony.

4 **THE COURT:** Well, then that's good ground for
5 cross-examination.

6 You may proceed.

7 **THE WITNESS:** He took all 840 of the class members and
8 put them in a random order, and then he started at the top in
9 terms of the first one in this random order. He had
10 plaintiffs' counsel issue subpoenas to the first person, and
11 the subpoena called for them to show up for a deposition.

12 When they showed up, they were given a questionnaire to
13 fill out that asked questions, like how often did you do this
14 and how often did you do that and how long did this take and
15 how long did that take. They'd fill out the questionnaire.
16 And then they would meet with counsel.

17 After meeting with counsel, they would --

18 **BY MR. EDELMAN:**

19 **Q.** Excuse me. They would meet with counsel for whom?

20 **A.** Well, for plaintiffs' counsel.

21 So they would meet with plaintiffs' counsel after filling
22 out the questionnaire and then they would be deposed. And a
23 deposition is an occurrence where you are in a room and there
24 is a court reporter and somebody asks you questions, very much
25 like here except it's in a room. And the person answers the

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1 questions. And each side gets to ask their questions as here.
2 You know, you will go first and then plaintiffs will go and
3 then sometimes there is some more after that. And that's all
4 written down and transcribed.

5 Dr. Phillips then got the transcript, the written record
6 of what was said, and his staff looked at each of the
7 transcripts and looked at each of the questionnaires, and they
8 came to some conclusions about what they thought each of the
9 people meant in terms of what they said about their usual
10 amounts of time.

11 So each of the people, they would -- Dr. Phillips' staff
12 came to some conclusions that well, this person usually spent
13 this amount of time when they washed their truck and this
14 person usually washed their truck this many times out of ten
15 usual trips. And so he came up with these averages for each of
16 these people.

17 And, as I said, he had ordered all the class members in
18 this randomized list and so he was shooting for 40 people to
19 ask questions about. So they sent out subpoenas to the first
20 and then they would send out subpoenas to the second and so on.

21 And not everybody answered the subpoenas. Some people had
22 died. They were on the class list that he had at the time, but
23 they had died. Some people got the subpoena and never showed
24 up. A lot of people --

25 **MR. SALTZMAN:** Narrative, Your Honor.

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1 **THE COURT:** Overruled.

2 **THE WITNESS:** A lot of people just they weren't able
3 to serve process, he said. So he had to go through about 105
4 people to get to these -- to get to these 40.

5 And so what Dr. Phillips did, as I said, is he had to come
6 up for his loss numbers with the amount of time that people
7 spent doing these activities, and so for some people, for some
8 tasks, he just assumed a number, 15 minutes for the pre-trip
9 inspection, for example.

10 For other tasks, he took the averages. It wasn't exactly
11 taking an average. He did what he called a Monte Carlo
12 process, which effectively at the end of the day is equivalent
13 to taking the average for the 40 in terms of getting the point
14 estimate. He took the average amount of time and the average
15 frequency from these 40, and for the 800 people who never
16 showed up, he took that average and said well, that's what they
17 did. That while they were working, this is how often they did
18 these activities, and when they were working at Wal-Mart, this
19 is how long it tended to take.

20 So that was the basic idea of what Dr. Phillips did.

21 **BY MR. EDELMAN:**

22 **Q.** All right. Again, we are still at the macro level before
23 we get into all the detail.

24 Did you draw an opinion, did you form an opinion after
25 analyzing Dr. Phillips' work and the data in the case as to

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1 whether his opinions were reliable or appropriate?

2 A. Yes, I did.

3 Q. Okay. Can you -- let me put up a chart, which I don't
4 intend to cover in detail at this point.

5 All right. I've put up a chart which we've marked for
6 identification as Defendant's Exhibit 687.

7 Can we also put that on the screen, please.

8 Okay. Again, we're going to cover this in more detail
9 later. So I just want to ask you to tell us what this chart
10 reflects.

11 A. Sure. This is just a summary of the categories of
12 concerns that I have and -- about what Dr. Phillips did. This
13 is a summary of sort of the categories of problems with his
14 data and his methods.

15 Q. So the first one, the class members' experiences are too
16 varied for damages to be measured reliably on a class-wide
17 basis. You've already talked a little bit about that in your
18 high-level conclusions; correct?

19 A. Yes.

20 Q. All right. And then in terms of arbitrary assumptions
21 that he made, the questionnaires he used being confusing, his
22 selectively choosing and then subjectively interpreting
23 responses, people's memory about frequency and duration being
24 unreliable, people being affected by unconscious influences,
25 and the group of drivers not being statistically

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1 representative, those are things we are going to talk about in
2 more detail later. Okay?

3 **A.** Yes.

4 **Q.** I want to, if we can, go to the next slide, please.

5 I want to start with your first point you made. And now
6 we're back to the first point on my chart about the data. And
7 we're going to talk about the data again in the same order
8 before we get to Dr. Phillips.

9 So with respect to your conclusion after reviewing the
10 data that because of the experiences of class -- of drivers are
11 not similar, you cannot draw conclusions on a class-wide basis.

12 First, please describe, Dr. Walker, the work you did to
13 come to this conclusion.

14 **A.** Sure. We -- we got computerized information from -- from
15 Wal-Mart, and we, you know, use our computers at our offices to
16 analyze those data, and we looked at things like how long are
17 trips. So for different trips, are they generally the same
18 length? Do they vary in length from person to person? How
19 about numbers of trips? Does everybody take the same number of
20 trips per week? Does the same -- do people tend to -- even if
21 it's different from person to person, do people's numbers of
22 trips change over time? Does the length of their trips change
23 over time?

24 Layovers. You know, do people tend to have the same
25 number of layovers over the course of a week or a year? You

1 know, over the course of the class period, on average was it
2 the same, you know, the experiences of drivers on average in
3 2014 as it was in 2004.

4 So we got the computer data and we analyzed it to try to
5 look for things like that to try to drill down on the idea of
6 whether things were basically the same or whether, you know,
7 they were not. They were dissimilar over time and across
8 people.

9 **Q.** And how long did this work of analyzing this data take you
10 and your team?

11 **A.** I -- I don't have an absolute number, but there were
12 hundreds of person hours that we put into analyzing the various
13 data sets in this case, the dispatch data, the driver data, the
14 CHP data, the Gasboy data and other data that Dr. Phillips
15 generated.

16 **Q.** What did you find from this data about how drivers'
17 experiences differed?

18 **A.** That they were all over the map. That there is no such
19 thing as a typical experience. That any individual driver's
20 experiences from day-to-day were highly dissimilar, and then
21 when you looked even on average for a driver from one driver to
22 another, you got different answers. You know, the data showed
23 different things about different people.

24 So one person's average wouldn't be representative of that
25 person's every day and one person's average wouldn't be

1 representative of another person's average either.

2 Q. Let's look at a slide from your report. And we'll go to
3 slide No. 4.

4 This is the type of slide that when I look at, I get
5 confused. So tell us what this is.

6 A. Okay. This is a graphical illustration of all of the
7 trips that a man named Mr. Allan took. So Mr. Allan was one of
8 the class members that took that subpoena and filled out that
9 questionnaire.

10 Q. So he's one of the 39?

11 A. He's one of the 39.

12 And alphabetically Mr. Allan is the first one of the 40,
13 of the 39. If you put them in alphabetical order, the first
14 person you see is Mr. Allan.

15 So what this chart has done is for each one of Mr. Allan's
16 trips, I have created a little diamond or the computer created
17 a little blue diamond. And so on this chart you have got dates
18 on the bottom and then we've got trip lengths on the top, and
19 so for each trip, I determine how long was the trip in terms of
20 the miles --

21 Q. Let me slow you down.

22 A. Sure.

23 Q. So the bottom is you're starting in January of '04 and
24 it's actually going through May of '16, so it's going a little
25 bit past the class period.

1 **A.** Yes.

2 **Q.** So we'll just, you know, focus our inquiry on up to
3 October of 2014.

4 But the bottom is showing the dates, right --

5 **A.** Correct.

6 **Q.** -- of the trip?

7 And then the vertical axis is showing how long the trips
8 were?

9 **A.** That's right.

10 **Q.** Okay. So something that's on the bottom is going to be a
11 shorter trip and something that is on the top is going to be a
12 longer trip?

13 **A.** If a diamond -- so each diamond, the place that it -- the
14 place it's placed on the chart is determined by when it
15 happened and how long it was. And so the longer the trip was,
16 the higher up on the chart it's going to be. So a trip that
17 was really short would be really close to this very bottom of
18 the chart. But a trip that was really long would be up higher.

19 **Q.** All right. So Mr. Allan -- in May of 2005 at the very
20 beginning there, we see two dots, three dots. Those are three
21 really short trips he took --

22 **A.** Yes.

23 **Q.** -- during that period?

24 **A.** Exactly.

25 **Q.** Keep going, please.

1 **A.** So what this shows, this is all of his trips, and then
2 there is a red line there that says 431. So if you were to
3 take the length of all of those trips and find the average
4 length, it's 431 miles for Mr. Allan over the period that is
5 covered by this chart.

6 And if it were the case that all the trips were the same
7 in terms of length, instead of seeing a chart like this, you'd
8 have sort of one thick blue that right along that red line
9 because it would mean that all of them were 431 miles.

10 But you don't see anything like that. You see basically
11 diamonds all over the place. These trips were just
12 significantly different, and they were different from day to
13 day.

14 You could see that sometimes it would be trips that are
15 really close to the bottom. Almost, you know, zero miles. I
16 don't know exactly how long those are. And then maybe the next
17 day he has got a trip that is 2500 miles.

18 So there is this huge variation just from Mr. Allan from
19 day to day to day, and even though you can calculate this
20 average of 431 miles, you know, it's not at all obvious, you
21 know. You'd actually have to use a computer to determine it.
22 It's not like everything is clustered around the same length of
23 time. There is a huge variation for Mr. Allan in the length of
24 the trips that he takes from day to day to day.

25 And you can also see that there's a -- even within the

1 chart, there is sort of a randomness, but there is a different
2 sort of randomness.

3 So if you look at June 2009 and then look to the left, it
4 looks a lot different from this little period from June of 2009
5 to March of 2012. So there you see this clustering much more
6 condensed than before, so this little period is different than
7 the period before. Then there is a gap in his employment, and
8 then there is another group of dots that, again, they're not
9 uniform at all. But they're non-uniform in a different way
10 from the ones that we saw before.

11 So experiences are varying from day to day to day. The
12 averages are almost certainly varying from one of these groups
13 to the next group. This is not a graph showing someone that
14 has a typical and common and uniform day from day to day to day
15 to day.

16 **Q.** So can you take an average -- I mean, as an economist, you
17 can average any set of data; right?

18 **A.** Yeah. You can take any group of numbers and calculate
19 what the average is, but it doesn't necessarily mean that the
20 average is representative.

21 So here the average is 431, but that doesn't mean that
22 usually Mr. Allan went on trips that were 431 miles. He went
23 on trips that were really, really long; he went on trips that
24 were really, really short. The vast majority clearly of these
25 trips were nowhere near 431. Just 431 happens to be the

1 average.

2 Q. Okay. Let's go to the next slide.

3 Please tell us what this is.

4 A. So this is similar as Mr. Allan. This is a graphical
5 picture of all of the trips that Mr. Lacas took starting when
6 he started, which looks like sometime in 2005, and then we have
7 data that continued a little bit beyond the class period.

8 And it's the same general idea as for Mr. Allan in terms
9 of how the chart is put together. It shows Mr. Lacas, because
10 I did this for all 40 -- all 39 of the people who took those
11 depositions, and if you line them all up alphabetically,
12 Mr. Allan was the first and Mr. Lacas was right in the middle
13 of the people that took the depositions. And so for Mr. Lacas,
14 we see the same basic idea that nothing is typical. There is
15 no usual. It's highly variable from day to day, the length of
16 his trips.

17 We also see little clusters that look -- although there is
18 still a wide degree of variation, they are different from other
19 clusters. So this period from roughly May of 2005 to October
20 of 2006, that looks a lot different from this period later
21 from, say, that is right underneath November of 2010.

22 So even though there is a wide variation from day to day
23 to day -- and there are also different periods where the
24 average trip length is, you know -- is much dissimilar from
25 some other period in time.

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1 We also saw -- I don't remember what the number was for
2 Mr. Allan. I think it was roughly 400 or so when you took the
3 average overall of his trips, but you can see Mr. Lacas, it's
4 significantly different. His is 210.

5 So even just the average, which is not representative of
6 day to day to day, but just the average itself over the entire
7 period is significantly different from Mr. Allan to Mr. Lacas.

8 **Q.** Let's do one more. Tell us what Figure 5 is.

9 **A.** It's the same general story, but now for Mr. Vasquez.

10 And, again, if you line up those 39, 40 people that were
11 supposedly representative, they were chosen because they were
12 supposedly statistically representative of the class,
13 Mr. Vasquez is the last alphabetically. So I chose the first
14 in the alphabet, the middle of the alphabet, and the third in
15 the alphabet, and we get the same idea.

16 Trips just vary day to day in terms of length. They are
17 nowhere near the average. They are very far from the average,
18 most of them are. The average is different than what the
19 average was for the other people. So Mr. Allan's average is
20 around 400. Mr. Vasquez was -- I think it was 288 or maybe it
21 was 210. I mean, you all saw it. Your memories are probably
22 better than mine. But it was different than 388.

23 We see the same basic story is that experiences are highly
24 dissimilar from day to day or from person to person to person
25 in terms of average trip length.

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1 Q. So back to my poor penmanship, but you were analyzing this
2 data to determine whether it can be assessed, damages or loss
3 can be assessed by the class-wide basis using a formula.

4 A. Right.

5 Q. Tell us why what you just explained to us about these
6 three drivers that you picked -- the beginning, the middle and
7 the end of the alphabet, although I think you said you have
8 charts for all of them.

9 A. I do.

10 Q. Tell us -- we're not going to go through all of them
11 today. Okay?

12 A. Okay.

13 Q. Tell us why the findings that you've reached or what these
14 charts represent -- tell us why that matters for this case.

15 A. Because many of these tasks you would expect to vary based
16 upon how long people's trips are. So if people tend to be on
17 much shorter trips, you would expect that to be related to how
18 often they end up meeting with driver coordinators, and the
19 frequency of meeting with driver coordinators will affect how
20 long you stick around and chat with them. It may affect how
21 frequently you are at a distribution center and have the
22 opportunity to refuel. It may affect how dirty your truck
23 gets, how often you have to wash it, how much time you take
24 washing it.

25 A lot of the tasks that we are concerned about are likely

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1 to be related to how long your trips tend to be. And if your
2 trip lengths are varying from day to day to day, there is
3 reason to expect and to be concerned that the amount of time
4 you spend on these tasks is also likely to vary from day to day
5 to day. And if your trip lengths vary from person to person,
6 there is reason to expect that these other tasks are going to
7 vary from person to person to person.

8 And if these other tasks vary from person to person, then
9 it's not going to be accurate when you take this average, and
10 you just assume that everybody is at an average, that everybody
11 is the same, that everybody is typical, everybody is usual.

12 **Q.** So the length of the trips you have been showing on these
13 charts is going to impact the types of tasks we've been talking
14 about in this case, both how often they're done and for what
15 length of time?

16 **A.** There is reason to believe and to be concerned about that,
17 yes.

18 **Q.** Okay. All right. Now, let me -- let's go to the next
19 slide that we are going to display.

20 Is this another slide from your chart?

21 **A.** From my report, yes.

22 **Q.** From your report. I'm sorry.

23 And would you tell us what Figure 6 represents. I know it
24 says -- let's start -- it says, "Average annual trips per class
25 member by domicile."

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1 Now, what is "domicile"?

2 A. Those were the distribution centers.

3 Q. Okay.

4 A. So Apple Valley, Red Bluff, Porterville.

5 Q. Explain to us what this slide shows, please.

6 A. Sure. This shows, by year, what was the average number of
7 trips by drivers at the different distribution centers. So
8 let's skip 2004 because the class started in October. There's
9 not many -- there's not a full year, which is why those bars
10 are shorter.

11 If you look at 2005, what the chart shows is the blue bar
12 is Porterville. And it shows that roughly about 225 was the
13 average number of trips that drivers who were headquartered in
14 Porterville took in 2005.

15 Then somewhat fewer trips were taken that year by drivers
16 in Red Bluff. Maybe 210. But there are a lot more trips by
17 drivers on average by -- by drivers operating out of Apple
18 Valley, closer to 300.

19 And so that's just explaining, you know, what the chart is
20 showing, and for each year we've calculated a different
21 average.

22 And the point of the chart is if we just take a look at
23 those green bars which have to do with Apple Valley, they make
24 the chart -- I think they make the easiest picture to see,
25 there are two issues that you want to take from this chart.

1 One is that it doesn't -- it's not constant. So it's not
2 the case that what's going on in 2006, for example, is
3 representative of what's going on in 2008. You know, things
4 are changing over time. And so if you're going to take
5 someone's -- well, let me get back to the fact that it's
6 changing over time.

7 The other thing to notice about this is that they are
8 different by domicile. So it's not the case that drivers in
9 Porterville tend to run the same number of trips in a year as
10 drivers in Apple Valley or that drivers in Red Bluff tend to
11 run the same number of trips as drivers in the other two
12 domiciles.

13 I mean, in particular, if you look at 2008, the drivers in
14 Apple Valley had, on average, over twice as many trips as the
15 drivers in Red Bluff.

16 So there are these big differences across domiciles which
17 calls into question whether it's going to be reliable to lump
18 all the domiciles together and try to estimate the typical day
19 in terms of how much time you spend on various activities for
20 everybody in each of the three domiciles, rather than looking
21 at all the domiciles separately.

22 **Q.** Thank you.

23 All right. I'm going to take you to another chart in your
24 report.

25 **A.** Yes.

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1 Q. Let's go to Slide 8.

2 A. Yes.

3 Q. This one looks totally overwhelming. So it's entitled,
4 "Statistical Tests of Survey Responses Drivers in the Top
5 Quartile" -- that is 25 percent?

6 A. Yes.

7 Q. Versus the bottom quartile, the bottom 25 percent?

8 A. Yes.

9 Q. Of average miles per trip?

10 A. Yes.

11 Q. Okay. That's about as much as I'm going to explain.

12 A. Okay.

13 Q. Now you need to tell us what this means.

14 A. This one -- so so far, we looked at this information that
15 tended to suggest that there is a lot of differences across
16 drivers in average miles per trip. And we saw that, look, the
17 amount of time you are driving is varying from person to person
18 to person.

19 And, as I said, there is reason to expect that is going to
20 impact the tasks we care about, but it's just an expectation.
21 It's not actually demonstrating that.

22 So what this analysis is intended to do --

23 Q. Let me stop you for a second, because I'm suspecting that
24 it's difficult to read.

25 A JUROR: Very.

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1 **MR. EDELMAN:** Yes. So are you able to do call-outs on
2 the fly? I know we have some for particular things, but not
3 otherwise?

4 **UNIDENTIFIED SPEAKER:** No.

5 **BY MR. EDELMAN:**

6 **Q.** Okay. Let's go back to the other slide, please.

7 I think that it would be helpful, since it's hard to read,
8 if you can read it, just tell us what these -- the columns on
9 the left represent, and then I think we can wait to understand
10 the numbers when you give specific examples. But when it says
11 "Question" and it's got 3A through 15-B.

12 **A.** Yes.

13 **Q.** -- what is that?

14 **A.** So these were the questions that were on the
15 questionnaire. So there was a questionnaire that was
16 administered to those 40 -- 40 folks who were selected from
17 that randomized list.

18 And so what this chart shows is for each of the questions,
19 there is a row. The first row says, "Usual pre-trip length."
20 So there was a question on the questionnaire -- that's
21 paraphrasing, but there is a question on the questionnaire
22 asking about each person's usual pre-trip length and they had
23 an answer.

24 Then the next question was usual post-trip length, and so
25 each of these rows represents one of the questions that was

1 asked.

2 The next column --

3 Q. Let me -- two things.

4 A. Sure.

5 Q. 6A says, "Number of washings in 10 usual trips."

6 A. Yes.

7 Q. And did the questionnaire have that "usual trips" in
8 quotes?

9 A. No. We put that in quotes to make clear that we're taking
10 that from the questionnaire. That, you know, I wouldn't use
11 the term "usual trips," because I think that that is confusing
12 because there is no such thing as a usual trip.

13 Q. All right. And so -- okay. So these are all the
14 questions on the questionnaire.

15 And then you've done A mathematical analysis which is
16 reflected in the next few columns.

17 A. Yes.

18 Q. And we can get into that, I think, through an example.

19 So 15A, why don't we focus on that, "Usual rest break
20 length."

21 Can we go to the next slide please.

22 Okay. All right. I read it wrong. So 15A is the number
23 of rest breaks in 10, quote, usual trips.

24 Can you explain to us the work that you did there?

25 A. Yes. So what's been pulled out is an example of the

1 information regarding a particular question. And so this one
2 was on the questionnaire, "Number of rest breaks in 10 usual
3 trips."

4 Overall for this chart, what I did is I took the 39 people
5 whom Dr. Phillips was relying on and who had filled out his
6 questionnaire, and then I went back to the dispatch data, which
7 has their average number of miles driven, average number of
8 miles per trip.

9 So for each of those 40 people, I calculated well, what
10 was their average trip length over the course of the class
11 period. And I put those 40 people in order based upon how long
12 they tended to drive. So the people at the top were the people
13 that had the longest average trip length; the person at the
14 bottom of the 39 was the person that had the shortest annual
15 trip length.

16 So now I have got this group of 39. I cut it up into
17 quarters. So this is the top one -- 25 percent of the people
18 in terms of trip length. Here is the next 25, here is the next
19 25, here is the next 25.

20 What this chart does is among those 40 people, it compares
21 the people who had the shortest trips on average to the people
22 who had the longest trips on average, and it says well, how do
23 they differ in terms of what they said about how frequently
24 they engaged in these tasks and how long they said that they
25 took.

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1 And the reason for this was to see whether it's the case
2 that people that drive longer trips tend to say different
3 things than people that drive shorter trips. So what this does
4 is it tests that idea that trip length matters. We know that
5 trip length is all over the board.

6 If it's also the case that trip length determines how
7 frequently you say you do this stuff, how often you wash your
8 truck, how many rest breaks you take in 10 usual trips, if it
9 affects that, then it suggests that it makes a big deal -- it's
10 a big deal that everybody drives different numbers of --
11 different lengths of trips from day to day because it suggests
12 well, your number of rest breaks is likely to vary from day to
13 day. And it's a big deal that some people drive on average
14 longer than others because it means that the people that drive
15 longer are likely to be different than the people who drive
16 shorter.

17 And so what we have pulled out here are the answers from
18 Dr. Phillips' questionnaire. This is what -- a summary of what
19 they wrote on their questionnaires, and it compares the bottom
20 quartile in terms of trip length, so among the people that
21 filled out questionnaires, the 25 percent who drove the
22 shortest trips on average -- it compares their answers to the
23 answers that the people who drove the longest trips on average
24 said.

25 And so what we see -- and you don't -- you can't really

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1 tell from the way that it's pulled out, but that 3.61, that's
2 the answer on average that the people who drove the shortest
3 trips said in terms of the number of rest breaks in 10 usual
4 trips. So on average, those 9 people said 3.61 rest breaks per
5 10 usual trips.

6 That number 7 there --

7 **Q.** Let me understand that. 3.61 rest breaks in 10 usual
8 trips?

9 **A.** That's what they estimated their average number of rest
10 breaks was per 10 usual trips when they were asked.

11 **Q.** So that's the way it's asked, is for ten usual trips.

12 What does that mean on a one-trip basis?

13 **A.** It would mean .3 -- you know, .4. Maybe once every other
14 trip. It's a little less than that.

15 **Q.** A little less than that. So they are taking fewer than
16 one rest break per trip?

17 **A.** According to their estimates, based on what per usual trip
18 means, yes, that's the idea. That's how they answered the
19 question.

20 **Q.** Because it's confusing when it says per ten trips. I just
21 want to make sure we have that. So go on.

22 **A.** So actually, if you look at the 17.21, it's not lined up,
23 but that's the number that -- the 25 percent who drove the
24 longest. So the drivers who drove the long trips, what did
25 they say on average in terms of the number of rest breaks they

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1 took per 10 usual trips.

2 And they said in 10 usual trips, they would take 17.21.

3 So one group says 3.61, less than 4. The other group says
4 17. So there is a huge difference. And as you see, that 376
5 percent, that's the difference.

6 There is a 376 percent difference in what the -- excuse
7 me -- the drivers who drove the shortest trips said in terms of
8 how frequently they take rest breaks versus the drivers who
9 took the longest trips on average, what they said in terms of
10 the frequency that they took rest breaks.

11 Those three little stars -- so that 13.6, that's the
12 difference. There was a 13.6, roughly a 14-trip difference --
13 I'm sorry -- rest-break difference in the number of rest breaks
14 the two different groups said that they took on average. And
15 those three stars there, that means that this is statistically
16 significant at the 99 percent level. That you can rule out to
17 a 99 percent degree of confidence that this is just random
18 chance that is causing this disparity.

19 That's particularly important because it's very difficult,
20 it's very unusual to get statistically significant differences
21 in averages when you're dealing with small numbers. Here we're
22 dealing with one group had nine in it, one group had seven in
23 it, yet this difference is so large that you can rule out to a
24 99 percent degree of confidence that it's due just to chance.

25 And it -- and it really tends to indicate, pretty

1 strongly, that if you take drivers who drive long halls and you
2 take drivers who drive the shorter halls, that you are going to
3 get a difference in what they say about how frequently they
4 take rest breaks.

5 **Q.** All right. Do we have a better way of displaying it
6 before we go on to the next example? Okay.

7 We might have an easier way to read this because I want to
8 go through one more example and figure it out. If I could just
9 ask everybody's indulgence for one second, we are going to try
10 to get PDF on the screen. That's it? Okay. Must be my eyes.

11 All right. Let's go to another example to illustrate your
12 point.

13 **THE COURT:** If you put it on the ELMO, it might be
14 easier.

15 **MR. EDELMAN:** You think?

16 **THE COURT:** You can make it bigger on the ELMO.

17 **THE CLERK:** Hold on.

18 **BY MR. EDELMAN:**

19 **Q.** Is that a little easier to read? Thank you, Your Honor.

20 Here we can see the questions a little more legibly, and
21 the next column representing your arithmetic calculations.

22 And then talk for a second about this top quartile and the
23 bottom quartile, so the top 25 and the bottom 25 percent of the
24 39 people, you have a certain number of responses.

25 **A.** Yes.

1 Q. Are those the number of people who responded to that
2 question?

3 A. Yes. The people who filled out the questionnaire didn't
4 always answer every question. Sometimes they put question
5 marks; sometimes they said "varies." Sometimes they said "I
6 can't tell." So this is the number of people within that group
7 of the -- of 25 percent who actually answered the question.

8 THE COURT: This is substantially worse.

9 MR. EDELMAN: I can't even see it. It's not on the
10 screen anymore. Which button did you hit?

11 MR. WONG: I was trying to get that lamp on to get rid
12 of the shadow.

13 MR. EDELMAN: I tell you what. I'm going to go back
14 to the other system anyway because I want to do a call-out.

15 THE CLERK: Hold on.

16 MR. EDELMAN: So, Kim, can we go to the next slide?

17 THE CLERK: Can you turn off the --

18 MR. EDELMAN: The ELMO?

19 THE CLERK: Yes.

20 MR. EDELMAN: Sure.

21 Q. All right. So now we're looking at something else, which
22 is the usual length of, quote, meeting at the end of the trip.

23 Why did you put "meeting" in quotes?

24 A. Because after reading the transcripts, deposition
25 transcripts and trial testimony, some of these interactions

1 weren't what I would call a meeting. I mean, when I hear a
2 meeting, I think of sitting down and conversing for a while.

3 These were sometimes just sort of, you know, "here's the
4 papers. Bye." So I put those in quotes because "meeting" is
5 the word that is used on the questionnaire, but I didn't want
6 to suggest that is really happening as to the meeting that I
7 had in mind.

8 **Q.** So what we are talking about here is what the plaintiffs
9 are calling a meeting, but it's when the drivers are getting
10 their dispatch instructions at the window?

11 **A.** This is actually the end of the trip, so, yes.

12 **Q.** Or turning in --

13 **A.** I mean, this is -- turning in paperwork, yes.

14 **Q.** Turning in paperwork.

15 So if we could -- yeah. Go back to that call-out.

16 Is there -- there is not a way to make that particular
17 thing more easier to read, is there?

18 Is that easier? No. Let's just stay with what we got.

19 Tell us what you're depicting here through your analysis
20 in terms of the usual length of the meeting at the end of the
21 trip.

22 **A.** Well, this was again -- this is -- the question on the
23 questionnaire had to do with how long does that meeting tend to
24 last. And I looked at the answers for the top 25 percent in
25 terms of the length of their trips and the bottom 25 percent in

1 terms of the length of their trips, and --

2 Q. Hold on a second. I'm getting a little dizzy here. Let's
3 just do the big one that has all the information. We'll just
4 stay with that.

5 A. Sure.

6 Q. All right. Go ahead, please.

7 A. So you could see -- actually this version I can't see.
8 The original I could tell, the one that was up before. This I
9 can see.

10 Q. Okay.

11 A. So the only numbers that are really important and what I
12 was going to say right now is the 9.67, and that was the
13 average for the people that drove the shorter trips, and they
14 said the usual length of that meeting on average was 9.67
15 minutes. So a little under 10 minutes.

16 And then the next number that is really important for this
17 is the 4.63. That was the average length that the people that
18 drove the longer trips tended to say. So they said their
19 meetings lasted a little under five minutes.

20 And the third number that is pretty important here is the
21 far left, the 5.04. That's the difference.

22 So there is a 5-minute difference. So the people that
23 drove the long trips said the meeting only lasted 4 minutes, 5
24 minutes. The people that drove the shorter trips said it was
25 twice as long. 109 percent is the difference. Five minutes

1 may not seem like a lot, but the difference between 5 and 10 is
2 double, and that means that when you get your loss estimates,
3 that the loss is twice as high for one group as for another.

4 And once again, those two stars means that this is
5 statistically significant at the 5 percent level. So it's not
6 1 percent level, but it's 95 percent confident, which is the
7 standard, a standard that is commonly used in scientific
8 literature that this is not due to chance.

9 And again, it's even though we're dealing with small
10 numbers. Nine people -- that's what that "9" is -- among the
11 bottom 25 percent answered this, and eight people among the top
12 25 percent answered this.

13 So even though you have got these really small numbers,
14 the disparity is so large that they are statistically
15 significant.

16 And you don't need to be able to read all of this
17 thoroughly, but I can see that some of these percentages -- and
18 maybe you can, too -- percentages differences for some of these
19 other questions are quite large. One of them is 399 percent.
20 Several of them are in the 20 percent. There is another one
21 that is 100 percent. There is one that is 67.9 percent. It's
22 not just one or two of these questions or categories for which
23 trip length seems to be related to the amount of time or the
24 frequency at which people engage in these activities.

25 It looks like that's normally the case. That for lots of

1 these different categories, a lot of these different
2 frequencies, meaning how often they occur, and a lot of these
3 durations, meaning how long they last, that trip length is
4 relevant, and we know that trip length varies a lot from driver
5 to driver and from day to day.

6 Q. All right. So you've described how the drivers' responses
7 to these questionnaires varied from one to another.

8 Did Dr. Phillips' questionnaires responses indicate that
9 the drivers experiences with the tasks were different as well?

10 A. Yes, it did.

11 Q. And let's take a look at Figure 15. Okay. So this is a
12 chart from your report; correct?

13 A. Yes, it is.

14 Q. And it's entitled "Frequency and Duration of Truck
15 Washing"?

16 A. Yes, it is.

17 Q. So this is showing how often people said they washed their
18 truck?

19 A. Yes.

20 Q. The frequency? And how much time it took, the duration?

21 A. How long they said, yes.

22 Q. How long they said. And these are their responses to
23 Dr. Phillips' survey?

24 A. Yes.

25 Q. What's the significance of the work you did in Figure 15?

1 **A.** Well, so far, we've gone through various analyses that
2 tend to suggest hey, people differ a lot in terms of length of
3 their trips. Here is some information that says hey, it looks
4 like these things that we care about are related to the length
5 of the trip.

6 This seems to suggest that people are going to be
7 different, that when you absolutely look at how long they spend
8 on these activities, it's going to be really, really different
9 from person to person.

10 This is testing that directly. So what this does is this
11 took all of the people from Dr. Phillips -- who took
12 Dr. Phillips' questionnaire, and each one of these triangles
13 represents somebody that answered both the question about how
14 frequently they washed their truck and also the question about
15 how long it took.

16 I don't remember offhand whether this is going to add up
17 to 39 because not everybody answered all the questions. So
18 some people might have said how frequently, but they didn't say
19 how long. Some people may have said how long, but they didn't
20 say how frequently. Some people may not have said either one.
21 They said, "It just" -- "it varied so much, I can't answer."
22 But for the people --

23 **Q.** Can I stop you for one second?

24 **A.** Yes.

25 **Q.** Horizontally you have the frequency per 10 usual trips?

1 **A.** Yes.

2 **Q.** If you go to 10, that would be somebody who said they
3 washed their truck every trip?

4 **A.** That's right.

5 **Q.** All right. So that's how often they do it.

6 And then on the vertical axis, they are saying how long it
7 took.

8 **A.** That's right.

9 **Q.** Go ahead.

10 **A.** Sure. So what this shows is for each person who answered
11 both questions, each of these diamonds represents such a
12 person. And so as -- as Mr. Edelman said, there is one in the
13 far right. This person said that he washed his truck 10 times
14 per 10 usual trips. So usually he said he washed his truck
15 every time he did a trip.

16 And then he said that when he washed his truck, it usually
17 took 20 minutes. So that it's 20 minutes is how high up we go,
18 and 10 out of 10 is how far to the right we go on the chart.

19 So we have plotted everybody who answered both questions
20 on this chart. And we also have this little red square, which
21 is the average, and just basically what Dr. Phillips is relying
22 upon when he tries to estimate what is it that the people who
23 weren't here do.

24 And what this shows is that people are all over the map.
25 If it were true that everybody was roughly the same, that

1 everything was right around average, you wouldn't see all these
2 diamonds all over the map. You would see a whole bunch of
3 diamonds right around that square, and you don't see that at
4 all.

5 You see that a lot of people washed their trucks much less
6 frequently than average. You saw a lot of people wash their
7 trucks more frequently than average. You see that a lot of
8 people took much less than the average response or said they
9 did in terms of the truck washing. A lot of people said they
10 took more than the average.

11 But the average itself wasn't representative of anybody.
12 There was no sort of typical for the class. They're just all
13 over the map. And, yes, you can calculate an average, but it
14 is not reliably telling you anything about any individual
15 person.

16 And why this matters is because if you then try to
17 extrapolate from this average and say hey, you know --

18 **Q.** You mean from the red dot?

19 **A.** From the red dot. And you say well, let's treat everybody
20 as though they are like this average.

21 Even if you're right that these people are like everybody
22 else -- and we're going to get to the board about why there are
23 problems with that -- but even if you think the rest of the
24 class, the 800 people that aren't here, the 800 people who
25 never took depositions or never took questionnaires or

1 whatever, even if you think they're just like these people, you
2 are likely to be way off for a whole bunch of them.

3 So nobody's estimates of their loss are going to be
4 accurate. Everybody is going to be way over or way under, on
5 an individualized basis, the amount of money that they would be
6 due. Even if you assumed they're just like these people, even
7 if you assumed that every time everybody washed their truck, it
8 was unpaid, even if you assumed that all these people's
9 estimates about how often they did these things were accurate,
10 you still would be tremendously off on an individual basis for
11 any person's actual loss.

12 Q. So this particular chart is just for truck washing?

13 A. Yes.

14 Q. Which is one of the nine or so tasks that the plaintiffs
15 have raised issues about in this case.

16 A. Yes.

17 Q. Did you do a chart like this in your report for each of
18 the tasks at issue?

19 A. I did.

20 Q. All right. And let's take a look at -- let me ask the
21 next question. Did the chart that you did for each of the
22 tasks -- we can't go through all of them today, but did they
23 show the same type of variation among the responses?

24 A. Yes, they did.

25 Q. All right. And so let's go to the next chart, which is

1 Figure 19 from your report.

2 So this is entitled, "Frequency and Duration," so how
3 often and how long it supposedly lasted of re-fuelings at
4 Wal-Mart?

5 **A.** Yes.

6 **Q.** Is this another -- is this like the last chart you did but
7 another example?

8 **A.** Yeah. This is just a different task, but it's the same
9 general setup.

10 **Q.** So walk us through this, please.

11 **A.** Sure. So, once again, on the bottom, going from left to
12 right, that's how often did they say it happened in 10 usual
13 trips. Going from bottom to top, that's how often did people
14 say it tended to last usually.

15 The little red square is the average. When you average
16 everybody's answers, that's where you end up. And then each of
17 the little diamonds represents somebody that answered both
18 questions. And, once again, rather than seeing everybody
19 clustered around that red square, which would be the case if
20 everybody was pretty much around average, you see this
21 dispersion. They are just all over the chart. That there are
22 people that wash their trucks much more frequently and took
23 much longer. There are people that wash their trucks much less
24 frequently and took less time. And so it's not the case that
25 there is typical, that all of the diamonds seem to be around

1 the same place.

2 To the contrary, there is just a large variation among
3 drivers -- among respondents, among these 39 people. There is
4 a large variation in how long they say it took to refuel at
5 Wal-Mart and how frequently they say that it actually occurred.

6 Q. And "mean" and "average" mean the same thing?

7 A. Yes.

8 Q. So you have explained that what Dr. Phillips did was he
9 would use that average or that mean for purposes of the work
10 that he did; correct?

11 A. Yes. He did something slightly different technically, but
12 it had the exact same result arithmetically. So he did this
13 Monte Carlo, and at the end of the day, this Monte Carlo is
14 just using the average, but it involves some steps in between.

15 Q. So when you have a scattered chart like this where you
16 don't actually have anybody who -- you don't even have a dot
17 that represents the average, what is the impact of applying an
18 average like that to assess the data across a group?

19 A. You are going to end up with individualized damages that
20 are subject to a wide degree of error.

21 So when people make estimates, as in polling, there is an
22 estimate of 53 percent of the people surveyed said this, and
23 that's an estimate of what the whole population is like.

24 Well, you know it's not exactly 53 percent in the
25 population, so you report what is called a margin of error, and

1 you can say with some confidence, some specific level of
2 confidence, well, the answer is within this margin.

3 And so -- and so for an estimate to be reliable, that
4 margin should be kind of narrow. It shouldn't be 50 percent
5 plus or minus 49 percent. That doesn't tell you anything.
6 Somewhere between 100 percent. So a reliable estimate has to
7 have a somewhat narrow margin of error.

8 What this means, this dispersion, it means that when you
9 try to extrapolate, when you just say everybody is the average,
10 on an individualized basis, the margins of error are going to
11 be huge.

12 So leaving aside all of the problems that are on that
13 board that we're going to talk about in a few minutes, even
14 assuming that people are accurate and their recollections of
15 how long things took and the 800 people that we don't know
16 anything about really are similar to these 40, leaving that
17 aside, assuming that is true, when you try to extrapolate from
18 data like this to the entire class, on an individual basis, you
19 can't be very confident that your estimates of loss are
20 anywhere near the estimates of loss -- the loss that people
21 actually incurred.

22 That's even assuming, as I said, that all those problems
23 on the board are wrong, assuming a way that people actually got
24 paid for any of these activities, leave all of that aside. You
25 still will end up with hugely unreliable estimates due

1 exclusively to this dispersion of people's experiences.

2 Q. In your report, you gave a simple example of what happens
3 when you take data that are completely different and you
4 average it to try to get the average.

5 A. Yes.

6 Q. Can you give the jury that example?

7 A. Yeah. That example was a father and his son. So a father
8 might be 6'3". His son is, his newborn baby, might be 20
9 inches long. So you can average their average heights. So
10 6'3" is 75 inches. Twenty inches for the baby. That's 95
11 inches. Half of that is the average. That's 47 and a half
12 inches. That is about 4' tall.

13 So you have a father who is 6'3", newborn baby, 20 inches.
14 The average of their heights is 4' tall.

15 That doesn't represent either one of them. The baby is
16 not 4' tall; the father is not 4' tall. Yes, you can calculate
17 an average, but it's not representative of either one of them.

18 So you can calculate averages here. You can calculate
19 averages, as I have done, on this chart, but it's not
20 representative of anybody. It's not representative of that guy
21 up in the upper right-hand corner. It's not representative of
22 that guy down there in the lower left-hand corner. It's not
23 representative of anybody at all. Yes, you can calculate it,
24 but it doesn't tell you anything about any individual.

25 Q. So take that baby and dad and apply that to what

1 Dr. Phillips did here where he worked with a subset of 39
2 people and then presented an analysis that is supposed to apply
3 to 840 truck drivers across a class.

4 **A.** Yes. It's the same issue, that the 840 -- assuming all
5 those other assumptions are correct, the 840 are spread out,
6 and they're much different than the average, and so if you use
7 that average for them, each one of their estimates is likely to
8 be off by a lot, and you won't be able to say to any degree of
9 certainty exactly how much that person's damages ought to be.

10 **Q.** Let's go to your next slide.

11 Do we have a better way of first displaying this just so
12 that folks can read the slide? And then we will drill down.
13 Just like you were doing a PDF -- you know what? Better yet.
14 That is slide No. 13. Let me just use the ELMO for a second.

15 I'm not going to ask Mr. Wong to help me on this one.

16 **THE COURT:** Would you put the ELMO on, Tracy?

17 **THE CLERK:** Is that what they wanted?

18 **MR. EDELMAN:** Maybe that is a little better.

19 **Q.** All right. Let's take it one step at a time. This says,
20 "Range of confidence intervals among re-sampled estimates."

21 And then you've got damage categories on the left. And I
22 realize part of it is highlighted so we don't see everything.

23 What are the damage categories? Are these from
24 Dr. Phillips' work?

25 **A.** Yes. So these were -- in his reports, Dr. Phillips

1 estimated individualized losses for each of the 840 people
2 using the method that I talked about, and these are each the
3 different categories of loss that he estimated.

4 So he added a category of loss for pre-trip inspections,
5 for post-trip inspections. He had one based on rest breaks,
6 based on the -- the respondents' answers when they were asked
7 about how many rest breaks per 10 trips.

8 He had one based on refueling at Wal-Mart where the
9 question was based on how many times per week. One based on
10 Gasboy. Another based on Gasboy. Both of those were the
11 frequencies were based on a number of re-fuelings per 10 trips
12 and so on. So he had a whole list of categories for which he
13 estimated loss.

14 Q. All right.

15 A. And he did this for every person.

16 Q. For every person --

17 A. In the class.

18 Q. For 840 --

19 A. 840 people.

20 Q. 840 people. All right.

21 So now let me walk you through or ask you to please walk
22 us through what work you did -- what work is depicted on this
23 slide.

24 A. Well, as I said, he didn't exactly just take averages. He
25 used this Monte Carlo method. And the difference between the

1 Monte Carlo method and just taking the average is in terms of
2 the estimate itself, you end up in the same place.

3 But as Dr. Phillips said on the stand, the advantage of
4 Monte Carlo is it allows you then to look at and see what the
5 margin of error actually is. So it generates a margin of error
6 so you can see how reliable are your estimates. And
7 Dr. Phillips published in his report well, what were the
8 margins of error for each individual person's damages estimates
9 for each one of his different categories of loss.

10 And so what I've done -- and they were huge. As I had
11 said, when you have those disparities like you saw in that
12 other graph, where, you know, the people's experiences are way
13 dissimilar from each other, I said -- and it's the case that
14 the damages are going to be extraordinarily imprecise. You are
15 not going to be able to say to a reasonable degree of certainty
16 that damages are close to whatever your damages estimate is.

17 And so what this chart does -- and there are numbers -- we
18 don't really -- if you want, you can see more closely. But
19 what it does is that for each of these damages categories, I've
20 identified the person that had the widest damages range, and
21 I've actually -- and I've also identified the person that had
22 the sort of the usual or typical damages range. And the
23 purpose was to illustrate that for each of these damages
24 categories, Dr. Phillips' damages estimates are incredibly
25 imprecise. That all he can say with a reasonable degree of

1 certainty or the degree of certainty that is typically used in
2 science, a 95 percent confidence level, all he can say is the
3 damages are within these bounds that are just outrageously
4 large.

5 And so this particular graph shows or the part that is
6 highlighted shows the damages range, the biggest range of
7 damages for any of those 840 people for the damages category
8 called end-of-day meeting per 10 trips or loss category.

9 So Dr. Phillips' estimates of the loss for Driver No. 12,
10 it looks like 12866. I can't quite make it out, but his driver
11 number is there. Dr. Phillips estimated a range of -- that it
12 started at \$810 and ended at \$118,518.97.

13 So to a 95 percent degree of confidence, Dr. Phillips was
14 able to say that that driver's loss for end-of-day meetings,
15 which were based upon the answers on the questionnaire that
16 related to 10 trips -- but that driver's loss was somewhere
17 between roughly \$800 and \$118,000. That's what he could say to
18 a 95 percent degree of certainty.

19 And that's not precise at all. That is, by definition, an
20 unreliable estimate. You can't say for certain that it's not
21 somewhere between -- not to a 95 percent degree of certainty
22 that it's not -- all you can say to a 95 percent degree of
23 certainty is that damages are somewhere between \$810 and
24 \$118,518.97.

25 Q. So sometimes one gets a little lost in the charts --

1 **A.** Yes.

2 **Q.** -- and you kind of got to get back to the big picture.

3 This wide -- this is just one particular driver where he
4 is showing the range?

5 **A.** Yes.

6 **Q.** One of the 840?

7 **A.** Yes.

8 **Q.** So just big picture, but short answer --

9 **A.** Yes.

10 **Q.** -- tell -- remind us again how this kind of range -- why
11 it matters in terms of the ultimate question of trying to
12 accurately figure out any alleged loss in this case.

13 **A.** Well, as -- going back to the charts that show the
14 disparities, what that showed is that people's experiences are
15 really widely varied, and what this says is that yeah, if you
16 just apply the average, you will get an estimate, but you know
17 from the data that are generating the estimate that the true
18 number could be, I don't know, \$118,000 more, or the true
19 number could be thousands of dollars less. You don't really
20 have confidence that that estimate is anywhere near the loss
21 that the person actually suffered, even if all of your other
22 assumptions are true.

23 **Q.** Okay. And have you done -- this one was for the
24 end-of-the-day so-called meetings.

25 Have you done another slide that reflects the median

1 range?

2 A. Yes.

3 Q. And I'm putting that up now. That's a supplemental figure
4 from your second report.

5 A. Yes.

6 Q. Can you explain to us what this is.

7 A. Yeah. This is -- so that \$118,000 number, that was the
8 biggest -- that was the largest range. And I wanted to
9 illustrate that that was not just there's this one example of
10 somebody that had an individual damage estimate that was not
11 precise.

12 So for each of these different categories, I've also shown
13 the median. Median means the one that's right in the middle.
14 So out of all the 840 persons for whom Dr. Phillips calculated
15 a damage estimate, for each -- and for each of them for whom he
16 calculated a damage estimate for end-of-trip meetings, I just
17 lined them up in terms of how big your damages range was, and
18 this one here that is up on the screen now is the one that was
19 in the middle.

20 So this is more typical. It's about the sizes of the
21 damages ranges that Dr. Phillips calculated related to
22 end-of-day meetings per 10 trips.

23 And this one, it's not, you know, \$800 to \$118,000, but
24 it's still an incredibly wide range. It's \$200, \$265 to
25 \$11,000. So it's an incredibly wide range, even for the

1 median.

2 And I think you can see in the background here in this
3 column that's the third from the right, there is some zeros
4 there. So for some of these damages categories, Dr. Phillips
5 couldn't even rule out, based on assuming all of his other
6 assumptions were true, that damages weren't zero for lots of
7 different people for lots of different categories.

8 Q. Next slide that I would like to ask you about from your
9 report, this also deals with -- well, this is now beginning of
10 the day, driver coordinator, what they call, meetings.

11 A. Yes.

12 Q. Can you walk us through this slide, please. This is
13 Supplemental Figure 12 from your report.

14 A. Yeah. This is just an example to show, look, the
15 end-of-day meetings isn't the only ones. We wanted to bring
16 out some other examples to look at.

17 This is the beginning-of-the-day meeting, and this is,
18 again, the person with the biggest range for his damages
19 estimate. This is -- looks like Driver 2382. I may have
20 gotten that number wrong. But this -- this damages range is a
21 low of \$291.66 and a high of \$98,211.58.

22 So to a 95 percent degree of confidence, Dr. Phillips
23 could conclude that this person's damages were somewhere
24 between roughly \$300 and \$98,000.

25 And this -- again, this is directly from Dr. Phillips'

1 report, Appendix A of his report. I did calculate these
2 numbers. I just sorted them and then picked the ones that were
3 in the middle and the ones that were the highest.

4 Q. So this is the highest? This is an example of the
5 highest?

6 A. Yes.

7 Q. Now we are going to look at like what you just did
8 previously, an example of something in the middle?

9 A. Yes.

10 Q. All right. So walk us through your slide Supplemental
11 Figure 12 from your second report, please.

12 A. Sure. The driver who had the median-sized damages range
13 in this category, his range was between \$291 and \$49,075.62.

14 So, again, just an incredible range, and what
15 Dr. Phillips' analysis shows to a 95 percent degree of
16 confidence is merely that if all of his other assumptions are
17 correct, that this person's loss was somewhere between about
18 \$300 and \$50,000.

19 Q. So if you look at all these ranges and how much they
20 varied and you've spoken about the -- what you view as the
21 unacceptability of the averaging approach that Dr. Phillips did
22 across the entire class, if you can't use a formula like
23 Dr. Phillips did in a case like this where you have 9
24 plaintiffs that are supposedly representative of a larger group
25 of 840, how do you go about figuring out damages for each

1 member of the class, if there are any?

2 **A.** Well, each person needs to go through and be analyzed on
3 an individualized basis. You look at each individual
4 circumstances, you look for information related to each
5 individual, you talk to each individual about their background.
6 You get whatever data the individuals have about, you know,
7 what they did and where they worked and how long they took
8 for -- to do these tasks and how often it happened and where
9 they were. You look to see whether they have other data that
10 are specific to them. And you do this on an individual basis.
11 But you can't do it accurately using these sort of averages or
12 formulaic approaches.

13 **Q.** So you are essentially saying you can't do it
14 formulaically on a class-wide basis?

15 **A.** That's correct. You cannot.

16 **Q.** Now, have you read -- you did, but did you focus on
17 Dr. Williams' -- Dr. Phillips' trial testimony where he gave
18 estimates for each of the individual plaintiffs in this case?

19 **A.** Yes, I did.

20 **Q.** I'm going to put on the ELMO for you and for members of
21 the jury and the Court the chart that we were provided that he
22 prepared, and -- just a little bigger. And then we can go
23 across each category as we need to.

24 So you understand that these 9 individuals are the 9 named
25 plaintiffs in this case?

1 **A.** Yes.

2 **Q.** Now, did Dr. Phillips -- let me just ask you: What do
3 these numbers that he has put by each of their names represent?

4 **A.** These represent his estimates of their losses by category,
5 and the total is on the far right.

6 **Q.** His estimates of loss?

7 **A.** Right.

8 **Q.** What do you mean by that?

9 **A.** Well, these are the numbers that he arrived at for each of
10 these individuals using his method of extrapolating from the
11 40, or, in some cases, taking a fixed number for everyone and
12 then applying it to the named plaintiffs. Using that
13 methodology, this is what he estimated each of these people's
14 losses would be.

15 **Q.** So let me make sure I understand that. So you've walked
16 us through a series of slides illustrating what you saw as the
17 problems in averaging when you have data that's all across the
18 map.

19 **A.** Right.

20 **Q.** Right?

21 **A.** Right.

22 **Q.** Are you saying that he used that same process to arrive at
23 averages and then he just applied them to the 9 plaintiffs
24 here?

25 **A.** For -- for most of these damages categories or loss

1 categories, yes. For some, he just applied a fixed number. So
2 pre-trip inspections, he said, "Well, everybody's pre-trip
3 inspections are always 15 minutes," so that did not come from
4 the averaging.

5 The post-trips --

6 Q. That was just an assumption he made?

7 A. That was just an assumption.

8 Q. It's not something that is specific to any deposition
9 testimony or trial testimony that the 9 plaintiffs gave?

10 A. That's right.

11 Q. Go on, please.

12 A. The same with the post-trips. That is totally unconnected
13 to anything that any particular plaintiff, let alone these
14 plaintiffs, said.

15 The unpaid rest breaks, that was based on an assumption
16 that everybody has 20 minutes' worth of unpaid rest breaks
17 every day. It wasn't related to anything that Mr. Ridgeway or
18 any of the other named plaintiffs said about their particular
19 experiences.

20 The waiting time was an assumption that everybody has got
21 45 minutes of wait time per week that was not compensated.
22 It's not tied to anyone's particular testimony about what they
23 did, what their experiences were, whether their wait time was
24 compensated, or whether they had wait time at all.

25 The DOT inspections, that's not tethered at all to

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1 anything particular to any of the named plaintiffs. The
2 weighing -- the washing the truck, the weighing outside
3 Wal-Mart, all of that is based on his extrapolations from --
4 from those 40.

5 None of that is related to anything in particular that
6 Mr. Ridgeway said, either at deposition or in any interviews
7 that Mr. Phillips had. I don't think he had any. It's all
8 related -- it's all based either on fixed assumptions or these
9 extrapolations. It's not related to their specific
10 circumstances.

11 **Q.** And those assumptions are the same ones where he made
12 assumptions, like a 15-minute rest break -- those are the same
13 assumptions that he made for the 840?

14 **A.** Yes.

15 **Q.** So he did the same thing with respect to the 9 plaintiffs
16 that he did with respect to the whole class?

17 **A.** Yes.

18 **Q.** It's your view that this analysis for the 9 plaintiffs
19 suffers from the same flaws as his analysis with respect to the
20 entire class?

21 **A.** Yes.

22 **THE COURT:** Do you know how much longer you have?

23 **MR. EDELMAN:** Now would probably be a good time,
24 Your Honor.

25 **THE COURT:** All right. Ladies and gentleman, we will

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1 take our lunch break. If you would be ready to come back,
2 please, at quarter till 1:00.

3 In the meantime, please do not discuss this case with each
4 other or with anyone else. Do not make up your minds. You
5 have not heard all the evidence yet.

6 (Luncheon recess was taken at 11:57.m.)

AFTERNOON SESSION**12:50 a.m.**

8 (Proceedings were heard out of presence of the jury:)

9 **THE CLERK:** Remain seated. Please come to order.

10 **THE COURT:** Are you ready?

11 **MR. EDELMAN:** We're ready, Your Honor.

12 (Proceedings were heard in the presence of the jury:)

13 **THE COURT:** Ladies and gentleman, as you may have
14 noticed, Tracy is not here. She has gone home. She is not
15 feeling great. Corin is going to help us this afternoon.
16 Thank you very much.

17 And, Mr. Edelman, you may proceed.

18 And you are still under oath, sir, from this morning.

19 **THE WITNESS:** Yes, Your Honor.

20 **BY MR. EDELMAN:**

21 **Q.** Good afternoon, Dr. Walker, ladies and gentleman,
22 Your Honor.

23 Dr. Walker, we left off before lunch talking about the
24 damage summary that was provided or the loss summary, whatever
25 you call it, that was provided with respect to the nine

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1 plaintiffs in this case.

2 I now want to switch gears and talk specifically about
3 your analysis of Dr. Phillips' work.

4 What did you conclude about whether Dr. Phillips was able
5 to reliably show how much the class was supposedly underpaid?

6 **A.** Ultimately, that he was not able to determine, to a
7 reasonable degree of accuracy and reliability, the losses
8 suffered by the class as a whole or by any individual class
9 member.

10 **Q.** And why is that?

11 **A.** Well, there are -- it's the various reasons that are
12 listed on the board, but in sum, it's because his -- the data
13 that he relied upon were not reliable, and there are a lot of
14 reasons for that that we can talk about later. And then the
15 methods that he used to extrapolate from those data were also
16 unreliable. And consequently, the ultimate estimates were
17 neither reasonable nor reliable either.

18 **Q.** And earlier you had mentioned that Dr. Phillips had used a
19 questionnaire?

20 **A.** Yes.

21 **Q.** And we saw in some of your charts a list of the questions
22 that he had asked. What is the difference between a
23 questionnaire and a survey?

24 **A.** There is no real difference.

25 Technically speaking, a survey is any collection of

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1 information about a sample that you're going to use to then
2 draw conclusions about a wider population from which the sample
3 is drawn. There are lots of different ways to collect survey
4 information.

5 If you do it using a written form, a questionnaire, that
6 questionnaire is often called a survey instrument where people
7 will say that's the survey, but whether you call it a survey or
8 you call it a questionnaire, it's the exact same thing. It's a
9 written instrument that is used to collect information from a
10 sample of people from which you intend to draw inferences about
11 a broader population.

12 **Q.** You heard or read, rather, Dr. Phillips' testimony where
13 he said that he didn't give a survey. He gave a questionnaire
14 instead.

15 **A.** Yes.

16 **Q.** Is there any significance to the distinction he was
17 attempting to draw in your mind?

18 **A.** No. There is no distinction in my mind. In both cases
19 you are trying to draw information from a smaller group of
20 people or a sample using a written instrument, a questionnaire,
21 to then use the information to draw conclusions about a broader
22 population.

23 The ultimate issue is the information that you're getting
24 from the questionnaire or survey or whatever you want to call
25 it, is that reliable, and is it reliable to draw inferences

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1 about the broader population based upon that information.

2 And there are principles contained within the survey
3 literature that talk about the circumstances under which you
4 can reliably infer things about a broader population from
5 information that you get from a sample of people. And whether
6 you call the original group of information survey information
7 or questionnaire information has no import whatsoever on the
8 reliability of the inferences.

9 **Q.** It has come out in this case that there were actually two
10 questionnaires or surveys that were presented to the
11 plaintiffs, the one that Dr. Phillips did and then we've seen a
12 two-sheet piece of paper -- I mean, a two-piece-of-paper
13 questionnaire that class members and plaintiffs were sent at
14 the beginning of the case.

15 Does the fact that -- by the plaintiffs' lawyers.

16 Does the fact that the class was sent two different
17 questionnaires or surveys make any difference in your mind?

18 **A.** Yes, it does.

19 **Q.** Why?

20 **A.** Well, later we will talk in a little more detail about
21 sources of error in surveys. I mean, what are some of the
22 things that cause error in surveys.

23 One of the things that causes error in surveys is when the
24 people that are filling out the survey know about the reasons
25 for the survey and the sponsors for the survey, and by sending

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1 out sort of a pre-survey to all of the class, that led some of
2 the people that were then chosen randomly by Dr. Phillips to
3 potentially have had information beforehand about, you know,
4 what people might be asking for, what might be the purpose of
5 the survey, and it undermines confidence in the answers that
6 they give on that second survey.

7 **Q.** And when you say they might have had some understanding
8 about what the purpose of the survey was, you mean that it was
9 connected to damage claims in the lawsuit?

10 **A.** I mean that it's connected to the loss claims in this
11 case, how much they might recover personally, how much their
12 colleagues might recover, yes. It's related to those things.

13 **Q.** All right. So now I would like to go to the chart which
14 we have marked for identification as Defendant's 687.

15 Is this -- does this chart have your language?

16 **A.** Yes, it does.

17 **Q.** Is this something that you prepared?

18 **A.** Yes. That's right.

19 **Q.** So did you find fundamental flaws in Dr. Phillips'
20 approach?

21 **A.** I did.

22 **Q.** And why don't you -- I think you've covered the first one
23 already.

24 **A.** Yes.

25 **Q.** So why don't we go to the second point, that Dr. Phillips

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1 made arbitrary assumptions.

2 What assumptions did Dr. Phillips make regarding
3 pre-trips?

4 **A.** Dr. Phillips assumed that every class member conducted a
5 15-minute pre-trip inspection on every shift that he was able
6 to identify and that that pre-trip inspection was
7 uncompensated.

8 **Q.** And what assumption did Dr. Phillips make regarding
9 post-trips?

10 **A.** Again, he assumed that every shift that he was able to
11 identify included a 15-minute post-trip that was also
12 uncompensated.

13 **Q.** And what assumption did Dr. Phillips make regarding wait
14 times?

15 **A.** For purposes of his loss calculation, he assumed that
16 every driver suffered 45 minutes of uncompensated wait time for
17 every week that he worked.

18 **Q.** And did you do any analysis of testimony that the drivers
19 did at their depositions concerning layovers?

20 **A.** I did.

21 **Q.** All right. And these are the -- is this the 39
22 depositions or is this the 50 or 60 depositions that you read?

23 **A.** The -- the calculations that related to layovers were
24 based on the 39 depositions. The 39 people who were -- who
25 Dr. Phillips selected that were, in his estimation,

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1 statistically representative of the class.

2 **Q.** Okay. And what conclusions did you or what analysis did
3 you do of the testimony of the 39 depositions in terms of what
4 those drivers said about layovers?

5 **MR. SALTZMAN:** Objection, Your Honor. Legal
6 conclusion. Argumentative. Calling for interpretation of the
7 testimony.

8 **THE COURT:** Overruled.

9 You may answer.

10 **THE WITNESS:** I basically went through their
11 deposition transcripts and I identified instances where they
12 were asked, "Have you ever spent a portion of a layover away
13 from your truck." And I found that in 85 percent of the --

14 **MR. SALTZMAN:** Objection, Your Honor. The objection
15 now, he has gone beyond that. The objection now would be
16 irrelevant and beyond the scope.

17 **THE COURT:** Well, I don't know what he found 85
18 percent of yet, so it's a little hard to gauge the relevance.
19 But it's overruled.

20 **THE WITNESS:** So out of the 39 drivers, 85 percent
21 said that they'd spent a portion, at least a portion of one
22 layover away from their truck. 82 percent of the 39 drivers
23 said that they had spent at least one entire layover away from
24 their truck. And 63 percent said that they felt that they had
25 the discretion to spend their layovers away from their trucks

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1 without Wal-Mart's approval.

2 And these are the percentages of people that actually said
3 it. Not all of the deponents were asked all of the questions.
4 So the -- in the case of the 63 percent, the 37 percent that
5 are remaining, it's not the case that they all said they needed
6 to get permission, but some of them just weren't asked the
7 question.

8 **BY MR. EDELMAN:**

9 **Q.** And okay. So that's layovers. Can you remind us what
10 Dr. Phillips' assumption was -- I think you said it a moment
11 ago -- regarding whether drivers took unpaid rest breaks?

12 **MR. SALTZMAN:** Your Honor, that calls for a legal
13 conclusion as to paid versus unpaid and therefore lack of
14 foundation and beyond his expertise.

15 **THE COURT:** I'm going to sustain the objection.

16 Can you reframe that question?

17 **MR. EDELMAN:** Sure.

18 **THE COURT:** Paid versus unpaid is what the case is all
19 about. So you are making assumptions in the question that I
20 don't think we have an agreement on.

21 **BY MR. EDELMAN:**

22 **Q.** What conclusions did -- again, I'm asking about the work
23 that Dr. Phillips did, to set it up.

24 What conclusions did Dr. Phillips reach about rest breaks
25 and any assumptions that he relied on in reaching those

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1 conclusions?

2 **MR. SALTZMAN:** Objection, Your Honor, vague and --

3 **THE COURT:** Overruled. You can answer.

4 **THE WITNESS:** Dr. Phillips assumed that each driver
5 had 20 minutes of unpaid rest during each of his shifts and
6 that no driver had any paid rest breaks during any of their
7 shifts.

8 **BY MR. EDELMAN:**

9 **Q.** So that's every day?

10 **A.** Every shift that a driver worked, they did -- they did not
11 take any paid breaks, they did not take breaks during any
12 period of time for which they were being paid, and they had 20
13 minutes of breaks that they took that was unpaid. That was his
14 assumption about every driver for every shift that he was able
15 to identify in the dispatch/payroll data.

16 **Q.** Okay. So that's just an assumption, that's not based on
17 the evidence, in other words?

18 **A.** Correct. That would be one of the arbitrary assumptions
19 that I'm talking about there on that second bullet point on the
20 board.

21 **Q.** All right. And did you -- why do you think that
22 assumption was arbitrary?

23 **MR. SALTZMAN:** Objection, Your Honor. Again, he's
24 going to the same issue, calling for legal conclusions.
25 Ultimate issue of the case.

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1 **THE COURT:** Overruled.

2 You may answer.

3 **THE WITNESS:** Well, one is regarding the issue about
4 whether everybody took 20 minutes of unpaid rest every day,
5 Dr. Phillips' own survey responses, and also what he called his
6 survey -- his hybrid data, which is -- it's based on the
7 surveys and the deposition transcripts.

8 Those data showed that not every one of the 40, 39 people
9 whom he said were statistically representative took breaks,
10 rest breaks at that frequency. Some people said they never
11 took rest breaks; some people said they took shorter rest
12 breaks; some people said they took rest breaks maybe three
13 times out of 10 trips. But it was not the case that everyone
14 said well we take 20 minutes of rest breaks for every shift.
15 I'm not aware of anyone that said that.

16 Secondly, the deposition testimony from these persons was
17 that they took rest breaks, in their words, while they were
18 being paid for wait time during a drop --

19 **MR. SALTZMAN:** Your Honor, again, move to strike.
20 Objection.

21 **THE COURT:** These are quotations from the --

22 **MR. SALTZMAN:** Legal conclusions --

23 **THE COURT:** -- from the deposition?

24 **MR. EDELMAN:** This is his review of the deposition
25 testimony, the same deposition testimony on which Dr. Phillips

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1 based his conclusions, which he is rebutting.

2 **THE COURT:** But did the drivers testify that they took
3 rest breaks while they were being paid wait time?

4 **THE WITNESS:** Some of them --

5 **THE COURT:** Is that what you -- I'm sorry.

6 **MR. EDELMAN:** I'm happy -- yes. That's what I
7 think -- that's what he is getting at, Your Honor.

8 **THE COURT:** Well, if it's inaccurate, you can --

9 **MR. SALTZMAN:** It's not a point of being inaccurate.
10 Can we have a sidebar really briefly on this?

11 **THE COURT:** Sure.

12 (The following proceedings were heard at the sidebar:)

13 **THE COURT:** So did his report include a citation to
14 the places in the depositions that he's referring to when he
15 comes up with these numbers?

16 **MR. EDELMAN:** I don't remember that.

17 **THE COURT:** Can you find out?

18 **MR. EDELMAN:** Can I find out?

19 **THE COURT:** Yes.

20 **MR. EDELMAN:** Your Honor, this is my colleague, Laura
21 Sucheski, who is the brains behind this operation.

22 **THE COURT:** She didn't hear you. You will have to say
23 that again.

24 **MR. SALTZMAN:** Make sure she hears it.

25 **MR. EDELMAN:** Your Honor, this is Laura Sucheski --

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1 **THE COURT:** He just said you are the brains of the
2 outfit.

3 **MR. EDELMAN:** The answer is yes, this is an appendix
4 to -- go ahead.

5 **MS. SUCHESKI:** So this is what he is talking about.
6 This is where he identified --

7 **THE COURT:** These are the depo transcripts.

8 **MS. SUCHESKI:** Where a rest break was taken
9 simultaneously during an activity pay.

10 **MR. SALTZMAN:** That goes to the ultimate legal issue
11 that we have been debating for three weeks. The drivers --
12 either deposition or here, but certainly at deposition under
13 the *Cardena* standard from Judge Carter's decision and others
14 that follow it, they don't understand there is no showing,
15 there is no foundation. They understand the difference between
16 a paid rest break and an unpaid rest break, so if you are
17 asking the driver that, they have no foundation to answer that.
18 And that's what the objections were at both here and earlier,
19 but now we have an expert hopscotching that entire issue and
20 potentially being allowed to testify about misunderstood legal
21 principles by class members, and that simply should not be
22 allowed.

23 **THE COURT:** So the three categories of things he wants
24 to talk about are what?

25 **MR. EDELMAN:** Well, at this point we are just on rest

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1 breaks.

2 **THE COURT:** I know. There are three things he wants
3 to say about rest breaks.

4 **MR. EDELMAN:** The last thing he wants to say that I
5 think he was about to get into is that there is testimony from
6 drivers that they would take their ten-minute rest breaks at
7 times when they were -- because a lot of drivers don't want to
8 stop to take -- like on the side of the road or whatever. They
9 would take their ten-minute rest breaks at times when they were
10 being compensated either through unscheduled time or while they
11 were waiting, but in any instance while they were being paid.

12 **THE COURT:** So he would say they would say they took
13 it on other time when they were being paid for something else.
14 And you would say "so what"; right?

15 **MR. SALTZMAN:** Well, I will say "so what" if I have
16 to, but I don't --

17 **THE COURT:** I think you do have to say "so what." And
18 what you are going to say is -- not to this witness, maybe, but
19 to the jury, well, these are the laws. Because they don't know
20 what the laws are so they are taking their rest breaks whenever
21 they can, but this is what has to happen.

22 So I think the fact that if they said that in their
23 depositions and there's all these citations which would suggest
24 to me you guys had an opportunity to figure out whether they
25 really said this in their depositions, he can repeat it.

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1 **MR. SALTZMAN:** The problem is, as you recall, we filed
2 the motion in limine to prevent this because I think it's --

3 **THE COURT:** Was it successful?

4 **MR. SALTZMAN:** Apparently not, Your Honor.

5 **THE COURT:** I guess not.

6 **MR. SALTZMAN:** But it's doubly problematic where now
7 we have an expert basically saying "I just looked at all this
8 stuff." They had a chance to bring on the witnesses. The
9 witnesses, over our objections, have made those statements. I
10 would have to literally go through every one of those to see
11 whether I objected to each one of those which obviously we
12 can't do. It's too prejudicial to have an expert come on and
13 say exactly what they shouldn't be saying, which is the
14 ultimate issues that drivers are said. They don't understand
15 what a paid rest break is under California law. There is no
16 foundation for that. Now we have --

17 **THE COURT:** He is saying what they took. He is not
18 saying they took a paid rest or unpaid. He is saying this is
19 what they testified to.

20 I'm going to overrule the objection.

21 **MR. SALTZMAN:** We've got to be really careful that
22 it's only what they said and he is not to be offering any
23 testimony that makes -- that they have paid rest breaks.

24 **MR. EDELMAN:** Look, I'm doing my best here, but you
25 lost your motion in limine. This has been in his report for

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1 six months, and now is not the time when the witness is on the
2 stand, in my view, to be telling me how to do my examination.
3 I mean, if this were an issue, it should have been brought up
4 before.

5 **MR. SALTZMAN:** I did --

6 **MR. EDELMAN:** Yeah, and the motion in limine was
7 denied.

8 **MR. SALTZMAN:** And I brought it up earlier this
9 morning.

10 **MR. EDELMAN:** This is in plain sight in his report,
11 and I'm trying to cover it in a way that does not elicit legal
12 conclusions. I'm not asking for the legal conclusions. I'm
13 doing the best I can. I think -- you know what I think.

14 **THE COURT:** You do your best to do what he says.

15 **MR. EDELMAN:** All right. Thank you.

16 (Sidebar conference ended.)

17 **BY MR. EDELMAN:**

18 **Q.** I think you were beginning to get into an explanation of
19 driver testimony --

20 **A.** Yes.

21 **Q.** -- from your report concerning rest breaks.

22 **A.** Yes.

23 **Q.** So what did the drivers say in their depositions, the 39
24 that we're talking about -- what did those drivers say about
25 whether they were earning pay while taking rest breaks?

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1 **A.** Well, 22 of them were asked questions about whether they
2 took rest breaks while they were earning pay and in the midst
3 of activities such as drops and hooks and arrives or
4 unscheduled time.

5 And of those 22, 16, or 73 percent of those who were
6 asked, said that they had taken breaks during time when they
7 were being paid, either being paid by the minute for
8 unscheduled time or by the minute for downtime or while they
9 were being paid for a live unload while they were waiting or
10 being paid during a live load or being paid in conjunction with
11 a drop or a hook.

12 Of the 22 who were asked, 16 said that they had gotten --
13 taken breaks while they were being paid for something else.
14 And the other six includes people whose answers were ambiguous,
15 and I don't know one way or the other.

16 **Q.** Did Dr. Phillips account for this testimony of drivers
17 taking rest breaks on paid time?

18 **A.** No, he did not.

19 **Q.** Did Dr. Phillips account, in his assumptions, for those
20 drivers who chose not to take the 10-minute rest breaks at all?

21 **A.** No. He assumed that everyone took 20 minutes of unpaid
22 rest every shift and that no one ever took any paid rest.

23 **Q.** So how does that affect, then, the reliability of
24 Dr. Phillips' conclusions?

25 **A.** It tends to suggest that his loss estimates will be

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1 overstated. So leaving aside that first bullet about how any
2 sort of extrapolation from an average in the circumstances such
3 as these will lead to hugely imprecise results, the fact that
4 he assumed that everyone took 20 minutes of unpaid rest on
5 every shift when there's evidence to suggest they did not and
6 his assumption that no one ever took any paid rest which would
7 reduce that 20-minute number, the fact that he assumed that
8 nobody did, those will tend to inflate his loss estimates
9 relative to whatever amount, if any, the class members, the
10 individual class members are entitled to.

11 **Q.** What about Dr. Phillips' assumptions that a pre-trip would
12 take 15 minutes, a post-trip would take 15 minutes and that
13 there was wait time of 45 minutes for every driver? Do those
14 fall into the category of arbitrary assumptions that you were
15 referring to?

16 **A.** Yes. Those are the arbitrary assumptions that I was
17 talking about. They are just assumptions out of nowhere that
18 are inconsistent with what the 20 -- I'm sorry -- the 39 class
19 members said. And they're inconsistent with what some of the
20 people have said here at trial about what they do on a regular
21 basis.

22 **Q.** Let's turn to the next topic, No. 3, where you said the
23 questionnaire was confusing.

24 Why or how was the questionnaire confusing? Can you give
25 an example?

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1 **A.** Yes. The most glaring example is sort of almost at at
2 very beginning when it talks -- it asks people filling out the
3 questionnaire to count things up in terms of usual trips. So
4 there were questions about, you know, how many times in 10
5 usual trips does this happen? Or usually what happens in this
6 way or that way or the other?

7 And the deponents, the survey takers were asked, "Well, is
8 there a usual trip?"

9 And they said, "No, there is no such thing as a usual
10 trip. And some of them said, "I was confused because there is
11 no usual trip."

12 So that would be one example of the confusion that was
13 embedded in the questionnaire.

14 **Q.** And what about the use of the word "trip"? Is that a term
15 from the depositions that you read after these questionnaires
16 were given that the drivers found to be confusing?

17 **A.** Yes. The use of the word "trip" was also confusing
18 because there are multiple definitions of trip running around
19 in the case -- or floating around in the case.

20 We've seen trip sheets, and many of the analyses that I've
21 put together are based on trips and trip is a term of art in
22 Wal-Mart. Drivers get instructions about where they're
23 supposed to drive and where they've supposed to drop things off
24 and the set of instruction is called a trip.

25 Dr. Phillips, on his questionnaire, said, "Tell me how

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1 many times this happened in 10 usual trips where trip is
2 defined as beginning and ending at a distribution center."

3 Well, trips don't always begin and end at distribution
4 centers, so once you add that definition, you now have got two
5 different types of trips, one of which is one that is specific
6 to this questionnaire that people don't use in their ordinary
7 lives and the other one is the one that is part of Wal-Mart.

8 Then there is a third definition of trip, which I have
9 learned about recently, with regard to Department of
10 Transportation guidelines. And they often talk about trip as
11 being the first -- as basically a shift. It's when you start
12 your day, when you end your day, is a pre-trip and a post-trip.
13 So there are different definitions of trip.

14 And many of the questions that Dr. Phillips posed to the
15 survey takers required them to sort of figure out, well, how am
16 I supposed to answer this? What's 10 usual trips supposed to
17 be.

18 And different people, once they were deposed after filling
19 out the questionnaire, said they interpreted it differently.
20 And then not everyone was asked so you don't know how they were
21 interpreting the instructions.

22 **Q.** Did the drivers themselves testify to being confused about
23 the questionnaires in their deposition?

24 **A.** Yes, they did.

25 **Q.** And how does the fact that the drivers were confused when

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1 filling out these questionnaires impact the reliability of the
2 ultimate conclusions that Dr. Phillips drew?

3 **A.** Well, when you are reviewing data that's collected from a
4 survey instrument, a questionnaire, whatever you want to call
5 it, if it's not clear what the respondents were answering, then
6 it's ambiguous when you try to interpret it, and it undermines
7 and reduces the confidence that you can have that your
8 interpretation of these answers is accurate.

9 You don't know for sure that the drivers were even saying
10 what you think they were saying. And we'll get into whether or
11 not what they are saying is accurate, but even what is it they
12 think they are saying in terms of -- what is it they meant to
13 convey in terms of how frequently things happen or how long
14 they last? You can't tell because there is ambiguity in the
15 questions. And so you have to interpret it if you're the
16 researcher, like Dr. Phillips' staff, and there is a lack of
17 confidence that the interpretation is accurate.

18 **Q.** Let's go to your third point, the questionnaire -- I'm
19 sorry. The fourth point, that Dr. Phillips selectively chose
20 and subjectively interpreted responses.

21 How did Dr. Phillips choose which responses upon which to
22 base his estimates?

23 **A.** Well, rather than relying on the questionnaire, what
24 Dr. Phillips said he did is he relied on a mixture of what
25 people wrote on their questionnaires and what they said at the

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1 depositions.

2 At the deposition -- so remember, the people came in,
3 they're given this questionnaire, they conferred with counsel,
4 and then there were questions that were asked by defendant's
5 counsel and by plaintiffs' counsel at a deposition.

6 And so they weren't all asked the same thing at the
7 depositions. They weren't -- all the questions weren't phrased
8 in the same way. And some people were asked about some topics
9 and some -- and not asked about others, and so Dr. Phillips had
10 his staff read through the depositions and he had given them
11 some instructions about how to interpret what they were
12 reading.

13 And the instructions that I read, that were an appendix to
14 his report, said well, to the extent anybody has a range, take
15 the two numbers that are in the range and take an average.

16 Sometimes people didn't give ranges. Sometimes people
17 gave ranges but they also said, "Well, usually it's this amount
18 of time." So they might be asked, for example, you know, "How
19 long does this, that or the other thing take?"

20 "Well, usually it takes 10 minutes," might be what they
21 write on their form. But then at the deposition, they might be
22 asked, "Well, what is the longest you have ever heard this
23 thing taking, and what is the shortest time you have ever heard
24 this thing taking?"

25 And so Dr. Phillips staff would then read through and see

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1 those two instances and say, "Well, we are going to take the
2 average of those two numbers," notwithstanding that the person
3 already told us how long this thing usually takes on the
4 questionnaire. There was interpretation that went into this.
5 It wasn't the case that there's a straightforward answer for
6 everyone that is right there in front of you to see.

7 Each one of these depositions, which were -- I don't
8 remember how long they were, but I think they lasted a couple
9 hours apiece -- each one of them, he had people reading through
10 and interpreting what is it that people are really saying about
11 how long these things take. And so there is a great degree of
12 subjective interpretation by Dr. Phillips' staff that went into
13 creating what he called his hybrid data, which is what he used
14 then to extrapolate, you know, to the rest of the class.

15 Q. So was this what he called coding?

16 A. Yes. This is what he called coding.

17 Q. And coding sounds scientific.

18 Did you find the approach that he took to be methodical?

19 A. No. It was not methodical or scientific. It was highly
20 subjective. There were some general guidelines that he had
21 given his staff. But I found once I looked at what they had
22 done and he provided that in his backup material, they didn't
23 always follow the guidelines.

24 Q. Let me show you a slide on representing an example of a
25 choice that Dr. Phillips made that you highlighted in your

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1 second report. And let's pull up slide 20, please. Okay.

2 So this says Dr. Phillips selectively chose responses
3 which is the topic we're on, an example.

4 A. Yes.

5 Q. It talks about a class member named Charles McLaughlin?

6 A. Yes.

7 Q. Can you tell us what this slide depicts?

8 A. Sure. Mr. McLaughlin was one of the 39 people who filled
9 out a questionnaire and then was deposed. On his questionnaire
10 he was asked how long does this driver coordinator meeting
11 last? And I don't remember the exact language but it was a
12 question about how long does it usually last. And he answered
13 that the usual amount of time was 25 minutes.

14 So then subsequently there was a deposition, and during
15 the deposition, he was asked basically, you know, "what's the
16 shortest you've heard of it taking," or, you know, "how short
17 could it be and what's the longest you have ever heard of it
18 taking and how long could it be?"

19 And he said, "Well, it could range from 15 to 45 minutes."

20 So Mr. McLaughlin had testified that it usually takes 25
21 minutes. So for purposes of his hybrid data, Dr. Phillips did
22 not use the 25 minutes that Mr. McLaughlin said it usually
23 took. Instead he looked at this range of 15 to 45 and he said
24 the average is 30, so for purposes of his hybrid data, he said
25 Mr. McLaughlin's trips or meetings with driver coordinators

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1 usually last 30 minutes, when Mr. McLaughlin had actually said
2 explicitly on his questionnaire they usually last 25, even
3 though the range is 15 to 45.

4 **Q.** So this is an example of what you were just explaining a
5 moment ago?

6 **A.** Yes. Yes. And this example, it results in a 20 percent
7 increase in what's attributed to Mr. McLaughlin relative to
8 what Mr. McLaughlin actually wrote on his questionnaire.

9 **Q.** Let's go to the next slide, please.

10 Okay. So this is another example, a second example of
11 responses that Dr. Phillips selectively chose according to you
12 in your report.

13 Can you explain what you are showing here?

14 **A.** These are actually three examples. So one example relates
15 to Mr. McKee. So Mr. McKee said that adjustments could take up
16 to two hours. And Dr. Phillips interpreted that to mean that
17 adjustments usually take two hours.

18 There is Mr. McCulley. Mr. McCulley said that he had
19 never been at a DOT roadside inspection that took more than 20
20 minutes. So Dr. Phillips' staff interpreted that as saying
21 that roadside inspections usually took 20 minutes.

22 Mr. McFall said the driver coordinator meetings last five
23 minutes or less. Dr. Phillips' staff interpreted that as
24 Mr. McFall saying that driver coordinator meetings usually
25 lasted five minutes.

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1 Q. Okay. I'm going to move to the next topic on your chart,
2 Exhibit 687 for identification. Memories about frequency and
3 duration -- memory about frequency and duration is unreliable.
4 So frequency, how often it happens, duration, how long it
5 lasts.

6 A. Yes.

7 Q. What do you mean by this?

8 A. There is actually an extensive literature, lots of
9 articles have been written about whether or not when people are
10 surveyed after the fact, about how frequently -- so semi
11 routine things happened, whether that's accurate.

12 Whether -- when you ask somebody, you know, "How often
13 were you stuck in traffic a year ago? How -- how -- how often
14 per week were you stuck in traffic in 2015," when you give
15 surveys like that, people do not tend to give accurate
16 responses. It's not that they're trying to be inaccurate.
17 It's just that they are systematically wrong and that they
18 systematically overstate certain types of activities and how
19 they have occurred.

20 And the way that that's measured is that you give surveys
21 about things where you have external information and you can
22 measure the survey response and you can compare it to the
23 external information.

24 So, for example, people have been asked, you know, "How
25 many hours did you work a year ago?" And then you could

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1 compare the survey answers to records that employers may have
2 and they systematically overstate hours worked.

3 People may be asked in the course of healthcare studies,
4 people who are involved in studies of drugs who have serious
5 health issues, so they have a reason to answer correctly. Some
6 of them are -- some experiments are set up so that they are
7 supposed to write down in daily diaries so how frequently did
8 you have this symptom or that symptom or the other symptom, and
9 then they are asked later on, they are given a survey, two
10 weeks ago, how often did you have this symptom, that symptom,
11 the other symptom, and they routinely overstate the frequency
12 at which the symptoms occurred.

13 There has been some studies based on housework where
14 people took daily diaries of how much time they spent on
15 housework and then after the fact, much later, they are asked
16 how much time did you spend per week on housework.

17 Men tend to overstate the amount of time they spent on
18 housework by over one hundred percent. Women tend to overstate
19 the amount of time they spent on housework by nearly 100
20 percent.

21 So asking people questions about how frequently things
22 happened in the past is not a reliable way to ascertain how
23 frequently it actually happened.

24 And these studies show that this sort of bias -- and when
25 I say "bias," I mean statistical bias. Some sorts of errors

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1 average out. So if you ask a hundred people, each one of them
2 is off, but on average, it's right.

3 Bias is a statistical term for error that doesn't average
4 out. These are not studies of 10 people I'm talking about or
5 20 or 40. There are sometimes a hundred, sometimes thousands.

6 And one of the things that -- that they have shown is that
7 if you are going to -- I'm sorry. If the length of period --
8 the period of time over which you are asking people to recall
9 is longer, so you're asking people about things a year ago or
10 two years ago, you're more and more likely to get inaccurate
11 responses.

12 Some of the research has shown that the bias starts to
13 kick in as soon as three or four dates and in this case, we're
14 talking about events that occurred in 2004, 2005, and then
15 averaging over an 11-year period.

16 And so Dr. Phillips was relying on these survey responses
17 about people's recollections about how frequently things
18 occurred on average, and that sort of analysis is inherently
19 inaccurate. There is no basis in the literature on surveys to
20 assume that people's average answers are likely to be true.

21 And to the contrary, there is evidence from other sorts of
22 validation studies that they will tend to overstate the
23 frequency. Not because they're trying to. It's just that's
24 the way people's memories work. When they have been measured,
25 that is what has been shown to be the case.

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1 Q. So when you talk about the literature in the field and you
2 talk about all the studies that are out there --

3 A. Yes.

4 Q. -- is Dr. Phillips method of relying on people to give
5 their memory of events that took place up to -- even more than
6 10 years ago, is that considered reliable in your field?

7 A. No.

8 Q. And were you able to actually test that based on the data
9 in this case?

10 A. I was.

11 Q. All right. How were you able to do that?

12 A. Well, for two of these activities we care about, we were
13 able to test. One we were able to actually test well, were
14 people's memories about how frequently they gassed up, was that
15 accurate, because we now have this Gasboy data. So people were
16 asked in the questionnaire --

17 Q. Let me just stop you. Remind the jury -- everybody what
18 the Gasboy data is again.

19 A. Sure. These were data that pertained to every instance at
20 which the trucks that were driven by the class members and many
21 other people refueled at Wal-Mart distribution centers. So the
22 Gasboy data, they don't say who refueled. They just have the
23 truck. And for every time a truck refuels, it shows the truck
24 number and the fact that it refueled.

25 Dr. Phillips and his staff were then able to match up

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1 trucks with class members. And they constructed a data set
2 that showed how frequently the class members refueled at
3 Wal-Mart distribution centers and had every instance over a
4 period of time.

5 So you could see how frequently, at best, because actually
6 the data show how frequently the trucks that class members
7 drove on a given day got refueled. We don't know for a fact
8 that it was the class member himself who did the refueling, but
9 this Gasboy data shows, at most, how frequently class members
10 refueled at Wal-Mart distribution centers during the period of
11 time that were covered by the data.

12 So we've got the Gasboy data, which actually show
13 objective evidence about the maximum number of times the class
14 members could have refueled at Wal-Mart during -- at Wal-Mart
15 distribution centers during the period of time that the Gasboy
16 data were around. And I don't remember off the top of my head.
17 I think it's 2013 to 2015 but it's a period of a couple of
18 years for which you have these data.

19 You also have the class member -- the 40 who took the
20 survey and who said, "This is how often I refueled at
21 Wal-Mart."

22 What I did is I took the people that were in both, the
23 Gasboy data and part of the 40, and I said well, did it match
24 up? Did what they said in terms of the frequency match up with
25 what we can actually see?

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1 And it didn't. It was just like all the other research
2 that we've seen on this sort of thing, that they on average
3 overstated that the frequency at which they gassed up at
4 Wal-Mart centers by close to 60 percent.

5 So that was the only sort of instance of frequency, how
6 often things do that we actually could test it. We could test
7 and we showed, well, look, the -- the frequency at which it
8 actually happened versus the frequency at which people recalled
9 it happening, it was a 60 percent difference.

10 I can't tell you whether it's due to the memory issues
11 entirely to recall issues, I can't tell you whether it's due to
12 some of the confusion or some of the other issues we are going
13 to talk about. But the net effect of all of that was that
14 there was a 60 percent overstatement in the frequency at which
15 people gassed up during the period for which we have data.

16 **Q.** All right. I want to ask you about some additional work.
17 Did you also compare data with memory in the context of DOT
18 inspections?

19 **A.** Yes, I did.

20 **Q.** What did you do in particular?

21 **A.** Well, that went to how long things last. There is not
22 only data and research showing that people tend to
23 systematically overstate the frequency at which things occur,
24 how often they happen, there is research to indicate that they
25 overstate how long things lasted, too.

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1 Q. Hold on one second.

2 A. Sure.

3 Q. Can we get slide 22, please?

4 All right. So now we're talking not just about how often
5 you do something, but how long something lasts?

6 A. Yes.

7 Q. And you were able to draw a comparison in this case
8 between the actual data we had versus what people said in these
9 39 depositions?

10 A. Yes.

11 Q. And that's what is depicted in this slide No. 22?

12 A. This is slightly different. There were two things I did
13 regarding duration. One of them had to do with the people who
14 came, the drivers who came and testified. So we have -- and
15 that's what this is.

16 Q. All right. Why don't you explain this.

17 A. So we have DOT data. So, again, you may have heard of
18 this DOT/CHP data. The CHP conducts these inspections and they
19 write down how long it takes in realtime when they are doing
20 them. And so we have a bunch of their reports. Dr. Phillips
21 got a bunch of their reports and he used that to estimate how
22 long DOT inspections actually last.

23 There are some of the people here who testified at trial
24 who testified on the stand about how long they thought DOT
25 inspections lasted for whom there were also actual DOT/CHP data

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1 we could look back to to see, well, was their expectation,
2 their recollection, was that accurate? Did it track with the
3 amount of time that the inspections that they took actually
4 took?

5 **Q.** Okay. So what you're doing in this slide is you are
6 actually comparing their trial testimony, which we have heard
7 in this Court, versus the data from the DOT and the CHP?

8 **A.** Yes.

9 **Q.** Go on.

10 **A.** So there were two instances where Mr. Green had a CHP
11 inspection that was part of the data set that was made
12 available to us. One of the first inspections on June 24,
13 2013, took 17 minutes. The second inspection on February 18,
14 2013, took 10 minutes. And Mr. Green's estimate was -- at
15 trial was that DOT inspections tend to take 30 to 45 minutes.

16 He actually had two inspections that lasted 10 to 17
17 minutes, but his estimate on the stand was well, they tend to
18 take a half hour to 45 minutes. So it's significantly off.
19 It's significantly overstated relative to the length of time
20 that it actually took, at least, you know, to the extent that
21 we can measure it.

22 Mr. Harold, his was pretty accurate. He assumed -- he
23 testified that they tend to take 20 to 25 minutes and his
24 inspection actually took 25 minutes. So his was pretty much
25 accurate.

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1 Mr. Hill had two inspections. One took less than 4
2 minutes. 3.75 minutes. One took a little -- about 7 and a
3 half minutes. But he testified at trial that they take 20
4 minutes to a half an hour. So the inspections that are
5 actually in the CHP data are about, you know, 3 to 7 minutes --
6 you know, almost 4, sorry, to a little over 7 minutes, and his
7 actual -- his estimate at trial was they're 20 minutes to a
8 half an hour. Lots, lots more.

9 Mr. Jennings had an inspection --

10 Q. Let me stop you, just in the interest of time.

11 A. Sure.

12 Q. I think you've conveyed that point clearly.

13 Was there -- was there another test that you did that
14 you -- I think I cut you off when you were starting to explain
15 it?

16 A. Yes.

17 Q. Could you explain that, please?

18 A. Sure. These were limited to the people who testified at
19 trial.

20 I also did a similar sort of analysis using the DOT data
21 that I did with the Gasboy data. So among the 39 people who
22 were selected by Dr. Phillips to be statistically
23 representative of the class, I found all of their instances
24 where they were in the CHP data, and you could see how much
25 their actual inspections took, how long they took, and I

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1 compared it to their estimates about how long CHP inspections
2 tend to take.

3 And then I calculated, on average, or at least
4 Dr. Phillips', you know, estimation of what they said, and I
5 compared, well, is it the case that the hybrid data for them
6 match up with what the CHP data says in terms of how long DOT
7 inspections actually take.

8 And what I found, it was not the exact same number, but
9 there was another roughly between 55 and 60 percent
10 overstatement in the amount of time that they estimated that
11 they spent on DOT inspections relative to the amount of time
12 that the CHP officers had written down when they actually took
13 the inspections.

14 So there are two different factors that are impacting
15 Dr. Phillips' hybrid data that frequencies are potentially
16 significantly overstated, and we have one example that we can
17 measure where they're overstated by 60 percent.

18 Then the length of time each thing takes separately is
19 potentially overstated and we have one example that we can test
20 and that's also another 60 percent.

21 These two factors are cumulative. So if you have got a 60
22 percent overstatement in the amount of time something takes and
23 you got an additional 60 percent overstatement in how
24 frequently it occurs, when you put the two things together, you
25 are going to overstate the amount of time spent on the activity

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1 on average by about 150 percent.

2 So --

3 Q. Okay.

4 A. Yeah.

5 Q. So when you are talking about this phenomenon of
6 unreliable memory, you're not suggesting that anybody is
7 purposely lying?

8 A. No, I'm not.

9 Q. You are just talking about what happens in the normal
10 course when people are asked to go back and remember things
11 from the past?

12 A. Yes. Yes. And the research is instances where there is
13 no incentive to lie. This is just what happens. In fact,
14 there is even incentive to tell the truth. Everyone is trying
15 to give their best estimate. It's just the best estimate is
16 not accurate.

17 Q. All right. Let's talk about your next concern, that
18 people are affected by unconscious influences?

19 A. Yes.

20 Q. What do you mean by that?

21 A. There I'm talking about two types of error that are
22 discussed at length in survey literature.

23 One of them is what -- what happens when people that are
24 taking a survey or they are giving the information, when
25 they're aware of the purposes of the survey.

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1 And the other -- well, let me finish with that one first.
2 If the people that are giving the survey, the people that are
3 writing things down or the people that are interpreting the
4 information, if they're aware of the purposes of the survey,
5 there is the potential for that to influence either the answers
6 that they give or if it's -- if we're talking about the people
7 that are interpreting the results, the interpretation that they
8 give. So you may have heard of something called a double-blind
9 survey.

10 What double blind means is that the person who is actually
11 filling out the survey doesn't know. Why am I filling out the
12 survey? What's this for? Who is sponsoring it?

13 And the persons that are either giving the surveys to
14 them, if it's oral, or the people that are interpreting the
15 results, if they are going through the data, they don't know
16 what is the ultimate purpose of this, you know, what is this
17 for.

18 The reason for that is to prevent the knowledge of the
19 survey and the purposes of the survey from influencing the
20 answers that they give. And the literature is concerned with
21 lots of ways that might happen.

22 I mean, the obvious affect here is that people knew that
23 this survey was about their pay and their colleague's pay. And
24 it's hard to imagine that wouldn't influence their answers.
25 And I don't mean that that wouldn't cause them to inflate, I'm

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1 not saying that. I'm saying how do you forget, how do you undo
2 and unring the bell when you know this is all about your pay
3 and the pay of your colleagues.

4 So that's one of the things that I meant by unconscious
5 influences.

6 The other is something that is called social desirability
7 bias. That is when people are surveyed about things that are
8 either thought to be socially good or socially bad, it
9 influences the rate at which they say they did them.

10 So the two examples that are most used in the literature,
11 one for positive is voting. And if you ask people, if you
12 survey them about whether they voted at some time in the past,
13 your survey responses will overstate the rate at which people
14 voted. So more people will say, historically in all the people
15 that have done this because it's always been the case, there is
16 a higher instance of people saying, "Yeah, I voted in 2008.
17 Yeah, I voted in 2004," than actually voted when you go back
18 and look at the actual voting rolls. So people overstate the
19 degree at which they engage in good things, things that are
20 thought of as good.

21 The flip side is they will understate the degree in which
22 the frequency at which they participate in things that are
23 perceived to be bad. So if you take a survey about people and
24 ask them, "Do you have a DUI," and then you compare that to
25 actual arrest records, that -- you'll find that a smaller

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1 percentage of people will answer affirmatively that I have a
2 DUI than what you see when you go back and look at arrest
3 records.

4 The reason this is relevant to this case is because some
5 of these tasks are potentially socially desirable. So the
6 reason that this is relevant is that, for example, washing your
7 truck.

8 Washing your truck is a courtesy. It's a courtesy to any
9 other drivers that are driving the truck. It's a courtesy to
10 Wal-Mart. It's a courtesy to your other drivers whose
11 reputation and image is affected by whether or not your truck
12 and all the other trucks are clean. So the social desirability
13 bias may influence -- don't know that it did, but the reason
14 that it's an issue is that it may have and you can't measure
15 it. Social desirability bias could influence the rate at which
16 people report having washed their trucks and the amount of time
17 they spent on it.

18 Similarly, pre-trip and post-trip inspections, those are
19 clearly socially desirable things. These are safety
20 inspections. And the more time that you spend making sure that
21 your truck is safe, the better it is for you, for Wal-Mart, for
22 anybody who happens to be driving on the road with you.

23 So there was no effort to control for those sorts of
24 things and they were potentially going to have an impact on
25 Mr.-- Dr. Phillips' results.

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1 Q. What about if people who are filling out surveys know that
2 they are doing so in conjunction with a lawsuit where damage
3 claims are going to be based on the results of those surveys?
4 What impact might that have?

5 A. Well, there are a couple. One is the obvious, that well,
6 you got a self-interest and that may prompt you to want to put
7 a higher number.

8 But aside from that, you're just aware. Leaving that
9 aside, you're just aware -- if you're even aware that that's
10 one of the things that this information is being put to over
11 the entire 40 people, there may be an impact on how people
12 respond. So this undermines your ability to have confidence
13 that the people's recollections of what they are writing down
14 is an accurate representation about what actually happened.

15 Q. And is that why the literature in your field relies on
16 things like blind studies and double-blind studies to eliminate
17 that type of potential bias?

18 A. Yeah. Whenever a researcher can, you would like to have
19 no such influences available.

20 Q. Was Dr. Phillips study double blind?

21 A. No, it was not.

22 Q. How not?

23 A. Well, the people that were -- that were taking the
24 surveys, they had been subpoenaed, you know. They knew that it
25 was part of the lawsuit. Many of them had been sent a survey

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1 before talking about the lawsuit. There was talk among drivers
2 about lawsuits. So everyone knew what this was about.

3 And then on the interpretation side, Dr. Phillips' staff
4 knew what the reasons were and how their interpretations of the
5 deposition responses impacted things. So everybody involved
6 was fully aware. So that's the opposite of double blind.

7 **Q.** Okay. Last topic on your board that the -- you're
8 concerned that the group of drivers that were being surveyed
9 and questioned were not -- the group was not statistically
10 significant. Tell us what you mean by that.

11 **A.** Well, you know, Dr. Phillips went through this process to
12 get a statistically representative group. Now, remember, he
13 put everybody in random order, and then so he chose the first
14 person that came up randomly and he tried to reach him and
15 tried to reach the second person and the goal was to get 40
16 people. But he didn't get the first 40. The first 40 is
17 random because he put them in random order and so the first 40
18 people is random. But he had to go through more people. He
19 ended up going through I think 105 people to get 40 to show up
20 and fill out the questionnaire and take the deposition.

21 And that happens. That happens in all surveys, that you
22 produce a random list and you can't reach everybody.

23 But the concern here and everywhere where you do these
24 surveys is that the factors that are causing people not to
25 respond could be correlated. It could be that there is

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1 something about them that has got some relationship to the
2 things that you care about. And that's what is called
3 nonresponse bias. That it could be that the people that end up
4 showing up are statistically different from the underlying
5 population, even though that first list was put together
6 randomly. And that happened here. It seems to have happened
7 here.

8 The -- the people who showed up for the depositions and to
9 take the questionnaire were overrepresenting people who were
10 retired from Wal-Mart or who are on extended leaves of absence.
11 So there was a higher percentage of people among the 39 who
12 were either retirees or on extended leaves of absence. There
13 was a higher percentage of them who were in that category than
14 for the class as a whole. So there was a smaller percentage of
15 people in the class that were retired than there were among the
16 people who took the questionnaires.

17 The reason we care -- because that could be random. It
18 could be random sometimes. One, I measured it to see, well,
19 how likely is that difference to be random. And I determined
20 that there is only a 9 percent chance that the difference that
21 we saw in terms of the percentage of people that were retired
22 or on extended leave of absence just happened by chance rather
23 than it being the case, that the retirees were systematically
24 overrepresented. Okay. It may not matter. If the retirees
25 and everybody else are the same in terms of how frequently they

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1 engage in these tasks, it's okay. No harm, no foul.

2 Well, I also looked to see among the 39, did the retirees
3 answer questions differently than the non-retirees, people that
4 were still working, and I found that there were differences in
5 the way the two groups of people answered the questions.

6 The people that were retired among the 39 or on extended
7 leaves of absence tended to say the tasks took longer or that
8 they occurred more frequently.

9 So there is a serious problem with Dr. Phillips' sample.
10 It doesn't appear as though it's representing the class
11 accurately statistically and it appears that it -- it's
12 overrepresented by or the people who are deposed were
13 overrepresented by people who were either retired or on
14 extended leaves of absence.

15 I also conducted other statistical tests based on the
16 driver data and showed statistically significant differences
17 between the class and the survey respondents in terms of things
18 like average trip length, number of miles driven and things
19 like that.

20 So ultimately, even though Dr. Phillips made an effort to
21 get a statistically representative sample, there is reason to
22 doubt that the sample he ended up with actually was
23 representative of the class.

24 **Q.** What about the size of the group? Did that -- was that of
25 any importance to your analysis?

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1 **A.** Yes. I mean, that affects again the reliability of the
2 responses.

3 And for some of these categories, you know, there were 39
4 people, at most, for any different given set of questions that
5 Dr. Phillips asked, from any of them, many fewer than 39
6 actually answered the questions. So these sample sizes were
7 very small, and given the methodology that Dr. Phillips
8 employed, that introduces more error that is sort of hard to
9 quantify.

10 Without going into great detail about this Monte Carlo
11 process, it's basically sort of resampling. You take a sample,
12 put it back, and sample again. I think that there was some
13 deposition testimony about an urn.

14 If you did a Monte Carlo analysis based upon one person,
15 so you only had one sample, one person in your sample, the
16 Monte Carlo analysis would indicate that you figured out for
17 those 800 people, each one of them, that you knew for a
18 certainty what their damages were, because every time you
19 reached into the urn, you came out with the same number.

20 But that sort of -- of -- but there clearly is uncertainty
21 in that example, but it just doesn't show up in the Monte Carlo
22 analysis. And the smaller sample, the more of that missing
23 uncertainty there actually is.

24 **Q.** Okay. A moment of silence for the court reporter who has
25 been working very hard.

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1 Ultimately, the impact of the group not being
2 statistically representative on the reliability of
3 Dr. Phillips' analysis is what?

4 **A.** That that is another reason to be concerned that his
5 estimates of the average amount of time that people spend on
6 tasks and the frequency at which they occur are both
7 overstated.

8 **Q.** All right. So in court, Dr. Phillips presented his
9 methodology which you've described today. And then he prepared
10 or counsel prepared a chart while Dr. Phillips testified. And
11 they made calculations that supposedly represented the amount
12 of money that the group, the class, was owed. You've read that
13 testimony?

14 **A.** I have.

15 **Q.** Okay. Were those calculations accurate or reliable?

16 **A.** No.

17 **Q.** Why not?

18 **A.** For the various reasons we've been talking about. The
19 accuracy is affected by the fact that they're based on
20 arbitrary assumptions. The fact that many of the answers that
21 people were giving, that they were relying upon, were answers
22 to confusing questions.

23 The fact that Dr. Phillips had to interpret what the
24 answers were. And at least in three or four instances, we know
25 for a fact he interpreted them in a rather odd way.

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1 The fact that there is reason to believe that the
2 estimates about how frequently things occurred and how long
3 they lasted were overstated. When we could measure it, it was
4 overstated by 60 percent, each one.

5 The fact that the group of people that he's extrapolating
6 from seemed to be overly populated by folks who were retired
7 and tended to recall more frequent and longer instances.

8 All of that indicates that it's not likely to be accurate
9 and as far as reliability goes, there is all that stuff we
10 talked about this morning, that even if it were accurate, it
11 wouldn't be reliable on an individual basis because you can
12 look at Dr. Phillips' own calculations of the reliability of
13 his estimates and they had these ranges from a few hundred
14 dollars to, you know, many tens of thousands of dollars. So
15 for all of those reasons, the individual calculations are
16 unreliable and also the aggregate is unreliable as well.

17 **Q.** A smaller question, just on one topic. Did Dr. Phillips
18 make any errors when he was calculating time owed for weighing
19 or adjusting a trailer?

20 **A.** Yes.

21 **Q.** What were those errors?

22 **A.** Well, the weighing and adjusting in particular -- what
23 this refers to is when drivers depart from a vendor, have to go
24 to an independent weigh station and they find out when they're
25 at the independent weigh station that there is something major

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1 wrong about their load, either it's overweight or it's
2 distributed in the truck in such a way that is not easily fixed
3 and the driver then has to go back to the vendor to get the
4 trailer reloaded. I mean, that's what the adjustments may
5 entail.

6 And the deponents were talking about what I just said,
7 they said they were at the depositions, when they wrote down
8 adjustments, the examples that they were using, what they were
9 basing their answers on included cases where they had to do
10 that.

11 The problem is those are instances where we know we are
12 not talking about uncompensated time. Wal-Mart's policy
13 when --

14 **MR. SALTZMAN:** Object. Lack of foundation,
15 Your Honor. Calls for speculation.

16 **THE COURT:** Wal-Mart's policy? What is his foundation
17 for that?

18 **BY MR. EDELMAN:**

19 **Q.** How are you familiar with Wal-Mart's policy?

20 **A.** The deponents who were talking about this talked about
21 their being compensated for it and they explained why during
22 their deposition testimony.

23 **Q.** So limit your explanation based on the deponent's
24 testimony.

25 **A.** Sure.

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1 Q. Since you don't work at Wal-Mart.

2 A. Sure. The people that talked about these adjustments
3 testified that when that happened in the specific instance that
4 they gave, the example they gave in the deposition, they were
5 compensated with mileage pay when they drove back to the -- to
6 the vendor and they were compensated by the hour for all the
7 time that they were waiting at the vendor for the reloading to
8 occur. So all of the time that was being used and thrown into
9 these averages for those sorts of examples, was time that was
10 compensated either by mileage or by the hour.

11 Q. Okay. I want to switch gears now and talk about what they
12 called their penalty analysis that was testified to by
13 Mr. Garcia.

14 A. Yes.

15 Q. Do you recall his testimony.

16 A. I do.

17 Q. All right. Now, again, to set the stage, can you briefly
18 explain what a penalty -- what was the penalty analysis that
19 Mr. Garcia attempted to provide?

20 A. According to Mr. Garcia's testimony, he understood that
21 there was a one-hundred penalty that would be applied for every
22 paycheck per person -- I'm sorry. The first paycheck per
23 person, which included a period of time for which someone
24 earned less than minimum wage.

25 So if someone had a paycheck covering a pay period and

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1 sometime during that pay period there was a period of time
2 during which they earned less than minimum wage, the first time
3 that happened, according to Mr. Garcia, he assumed that there
4 was a one-hundred dollar penalty due, assuming that Wal-Mart
5 was intentional in having not paid that minimum wage for that
6 time.

7 **Q.** Let me just stop you there.

8 So one of the assumptions in Mr. Garcia's analysis was he
9 just assumed liability on Wal-Mart's part and that the conduct
10 was whatever -- whatever conduct that issue was, was
11 intentional?

12 **A.** Yes.

13 **Q.** All right. So with that assumption, what did he then do?

14 **A.** And then he assumed that if it happened again, each
15 subsequent paycheck, there is a 250-dollar penalty per paycheck
16 per person. And so then thirdly, he assumed that every
17 paycheck that class members got over the class period included
18 these violations.

19 So he went through all of the paychecks and he assumed --
20 we did it by calendar. He didn't actually look at paychecks,
21 but every period where they should have gotten a paycheck, and
22 for the first one per person, he added \$100. For the second
23 one per person, there's 250. 250 for the third and thereafter,
24 and he added up all those penalties.

25 **Q.** Was that a reliable approach?

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1 **A.** No.

2 **MR. SALTZMAN:** Objection, Your Honor, calls for a
3 legal conclusion. Lacks foundation.

4 **THE COURT:** Are you asking statistically?

5 **MR. EDELMAN:** Yes.

6 **MR. SALTZMAN:** He is asking just did he multiply,
7 that's okay.

8 **THE COURT:** I don't understand that, but I'm
9 overruling your objection and you can answer the question.

10 **BY MR. EDELMAN:**

11 **Q.** Why was the statistical or mathematical approach that he
12 utilized unreliable?

13 **A.** Because it wasn't based on any evidence that any
14 particular paycheck or any number of paychecks or any paychecks
15 at all actually covered a period of time during which the
16 person who was receiving the paycheck wasn't receiving minimum
17 wage. It was just based on an assumption that each and every
18 such paycheck had that.

19 **Q.** So are there there any other reasons that the calculation
20 of the unpaid penalty was flawed?

21 **A.** Yes.

22 **Q.** What else?

23 **A.** Ultimately, if -- if it's determined that the first one
24 was not intentional, the calculations are of no more use
25 because that was built in. So in that way, they are also

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1 flawed.

2 **Q.** Okay. In conclusion, Dr. Walker, are Dr. Phillips' damage
3 calculations a reasonable and reliable estimate of the value of
4 time that was spent on the tasks?

5 **MR. SALTZMAN:** Objection, Your Honor. Asked and
6 answered.

7 **THE COURT:** Overruled.

8 You may answer.

9 **THE WITNESS:** No, they are not.

10 **BY MR. EDELMAN:**

11 **Q.** And in conclusion, Dr. Walker, are Mr. Garcia's penalty
12 calculations a reasonable and reliable estimate of potential
13 penalties in this case?

14 **A.** No, they are not.

15 **MR. EDELMAN:** Excuse me one moment, Your Honor.

16 (Defense counsel confer off the record.)

17 **MR. EDELMAN:** No further questions, thank you, sir.

18 **THE COURT:** Mr. Saltzman, would you like to start
19 right this minute or would you rather have our afternoon
20 recess.

21 **MR. SALTZMAN:** We may as well have the afternoon
22 break, Your Honor.

23 **THE COURT:** The court reporter might agree with you on
24 that.

25 Ladies and gentleman, if you would be ready to come back,

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1 please, at 20 minutes after 2:00. In the meantime, don't speak
2 with each other or anyone else about this case. Don't make up
3 your minds. You have not heard all the evidence yet.

4 (Proceedings were heard out of presence of the jury:)

5 (Recess taken at 2:04 p.m.)

6 (Proceedings resumed at 2:20 p.m.)

7 (Proceedings were heard out of presence of the jury:)

8 **THE CLERK:** Remain seated. Please come to order.

9 **THE COURT:** Are you ready?

10 **MR. SALTZMAN:** Yes, Your Honor.

11 **THE COURT:** Okay.

12 (Proceedings were heard in the presence of the jury:)

13 **THE COURT:** All right. Mr. Saltzman, you may proceed.

14 You are still under oath from before, sir.

15 **THE WITNESS:** Yes, thank you.

16 **CROSS-EXAMINATION**

17 **BY MR. SALTZMAN:**

18 **Q.** Good afternoon, Dr. Walker.

19 **A.** Good afternoon.

20 **Q.** How do you do?

21 **A.** I think you say "how do you do" back. How do you do?

22 **Q.** Okay. Good.

23 So we met before at your deposition; right?

24 **A.** Yes.

25 **Q.** Okay. So I'm going to be asking you some questions for a

1 while now, and we'll go over some of the areas you've covered.

2 Now, to begin with, I want to go back through the history
3 of the data that was involved in this case.

4 You said you reviewed Dr. Phillips' deposition testimony;
5 is that correct?

6 A. Yes, I did.

7 Q. And his trial testimony?

8 A. Yes, I did.

9 Q. So you're aware from all of that, that it took some time
10 until plaintiffs were able to get custody of and the review of
11 the electronic data, payroll dispatch data you referred to;
12 correct?

13 A. It was sometime after he was retained that it was provided
14 to him, yes.

15 Q. And by the time he was able to get that data to analyze,
16 do you understand that he had already prepared and they had
17 already done the survey and were commencing depositions;
18 correct?

19 A. I --

20 Q. The questionnaire?

21 A. -- think so. But I don't remember the exact timing of
22 everything, but that may be true, yes.

23 Q. So absent -- if there had never been any data produced
24 here, there would have had to be some way to figure out how to
25 get reasonable estimates, correct, without having any data

1 whatsoever?

2 **A.** If -- if there were no data, then I presume you would have
3 tried to do something else, yes.

4 **Q.** Okay. And one of those things might be a questionnaire
5 and some follow-up depositions; correct?

6 **A.** You may have tried to do that, yes.

7 **Q.** Okay. And, in fact, that happened prior to the time that
8 Dr. Phillips was able to obtain the electronic data and payroll
9 information we've talked about; correct?

10 **A.** As I said, I don't really remember all the timing of
11 everything. It may -- it may be. I don't dispute that.

12 **Q.** Okay. And it was also before Dr. Phillips was able to
13 obtain the Gasboy data; correct? Which came in basically
14 really this summer; right?

15 **A.** The depositions did commence prior to our receiving the
16 Gasboy data, yes.

17 **Q.** Okay. And also before Dr. Phillips was able to obtain the
18 DOT inspection reports that you referred to; correct?

19 **A.** Yes. The depositions, the 39 depositions commenced prior
20 to our receiving the CHP data. I don't know exactly when he
21 got his data or what he said, but certainly before we got it.

22 **Q.** Okay. And you have testified that the survey, the
23 questionnaire, actually, as you called it -- it's been called a
24 questionnaire -- you've testified that the questionnaire was
25 confusing; correct?

1 **A.** That -- yeah. That it confused several of the deponents.
2 They said they were confused, yes.

3 **Q.** And do you agree that one of the ways in which it was
4 confusing to the recipients of the survey or the
5 questionnaire -- one of the ways it was confusing was that it
6 referred to 10 usual trips; right?

7 **A.** That was one of the ways that they said they were
8 confused, yes.

9 **Q.** Okay. What do you understand a usual trip to be?

10 **A.** I don't understand there is such a thing as a usual trip.

11 **Q.** Okay. That might have been one of the problems with the
12 document; right?

13 **A.** Yes.

14 **Q.** Okay. Now, you did talk about one of the documents that
15 you were shown. It was called figure 9 and it was page No. 8.

16 Counsel, do you have a clean copy? I have written on
17 mine.

18 **MR. EDELMAN:** Which slide number is it?

19 **MR. SALTZMAN:** Slide number Figure 8 -- Figure 9, Page
20 8 of your presentation.

21 **THE COURT:** I have it if you want it.

22 **MR. SALTZMAN:** Let's go to the ELMO. I'm fine with
23 that. Thank you so much, Your Honor.

24 **Q.** And you talked about in terms of the -- the top quartile
25 and the bottom quartile of the people that had the

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1 questionnaire referring to Line 12 B, the usual length of
2 meetings at end of the trip -- and I'll point to that here for
3 the jury, it would be right here, the 4.63, and to the right,
4 9.67.

5 Do you see those two numbers?

6 **A.** I do.

7 **Q.** So the 4.63 relates to those drivers who you said had the
8 longest trips; right?

9 **A.** I think so. I mean, I don't -- if you showed the top, I
10 could tell you. But I think the longest was first.

11 **Q.** And the second quartile was the one to the right was those
12 who had the shorter drives; right?

13 **A.** Yes.

14 **Q.** Okay. So when -- and we're talking here about the usual
15 length of meeting at the end of a trip.

16 Sir, if someone has multiple trips per day or multiple
17 delivers in lieu of, let's say, one longer trip with one
18 delivery, would you agree that that person with multiple trips
19 will have more paperwork to turn in at the end of the day
20 because they had multiple stops and delivers?

21 **A.** That might be the case. I don't know. I thought that
22 they turned -- that they often turned in paperwork at the end
23 of each trip. But it could be that that is something that
24 happens and that's, you know, another reason why you shouldn't
25 be aggregating everyone altogether as one. That could be one

1 explanation for this difference.

2 Q. So we have people -- so people that have multiple drops
3 will have more time with the coordinator and people with the
4 single drop perhaps or a single triple will have less time with
5 the coordinator; correct?

6 A. I don't know --

7 Q. Make sense?

8 A. -- that. I said that that is a -- if it's the case, that
9 people collect all of their trip information at the end of
10 their trips and don't actually turn it in at the end of trips
11 but have rather collected all, it's possible that they might
12 have more paperwork to turn in to their coordinator at the end
13 of the day than people on longer trips. That's a potential
14 explanation for what we see here.

15 Q. Okay. And then at the end of the day, when we average
16 those together, if we have literally just the two numbers you
17 have here, and you had 4.63 and 9.67, so the average is about 7
18 and a quarter, correct, if we took the midpoint of those two?

19 A. Let's see. 4.63, 9.67 so it's 13, 14, 7 and a quarter,
20 that's about right, yes.

21 Q. If we had 10 drivers in this class, it was a 10-person
22 case instead of 800, and we had five short -- had more short
23 halls and five that had longer halls, they would average seven
24 and a quarter hours -- seven and a quarter minutes for those
25 duties, correct, just averaging them together?

1 **A.** Well, no. It would depend on who these 10 people are. As
2 I said, this is what people answered in their questionnaires.
3 If those people that you are talking about in this hypothetical
4 are 10 people who answered the same way as the people that
5 answered this questionnaire, there is still the question in
6 terms of are they remembering correctly.

7 **Q.** Okay. Let's deal with that -- let's move on to are they
8 remembering correctly.

9 You gave examples on memory issues. You gave one example.
10 There were -- people were asked how many hours they worked a
11 year ago. Do you recall that?

12 **A.** Yes.

13 **Q.** And when they compared later to records, people were --
14 had errors in recalling how many hours they worked a year ago.

15 In this case, sir, do you agree with me that these drivers
16 on the tasks that are involved here, these are tasks that they
17 do literally every day of their driving work life?

18 **A.** Some of them are tasks that occur every day.

19 **Q.** Let's go through them.

20 **A.** I don't know whether they are all -- in fact, I don't
21 think that they are all tasks that occur every day, no.

22 **Q.** Let's go through them. The pre-trip and post-trip
23 inspections, you understand that those are done -- the pre-trip
24 is before they begin driving for the day, the first inspection
25 before they begin to drive for the day?

1 **A.** Yes.

2 **Q.** That has to be done every day; correct?

3 **A.** Yes.

4 **Q.** And a post-trip is done at every day at the end -- when
5 they finish driving at the end of their shift; correct?

6 **A.** They are supposed to, yes.

7 **Q.** By law, do you understand that you have to fill out a form
8 called a DVIR, a Driver Vehicle Inspection Report when they
9 complete a post-trip inspection?

10 **A.** I don't remember. I may have read about that, but I don't
11 recall off the top of my head.

12 **Q.** Are you aware that they have to turn in that DVIR form to
13 their coordinator at the end of each day's shift or at the end
14 of the week when they return, if they have them? They have to
15 give them for every single day they drive?

16 Do you know that?

17 **A.** I don't recall that. It may be that it was mentioned in
18 the transcripts that I read, but I don't recall. But I don't
19 doubt what you're saying -- I don't doubt that it's true.

20 **Q.** Okay. So that's something they do each and every day?
21 Agreed? The post-trip inspection?

22 **A.** The post-trip inspection they're supposed to do at the end
23 of each driving day, yes.

24 **Q.** Okay. And the layovers we've talked about, when a driver
25 is on the road, a layover is if they are on the road, they do a

1 layover every day; correct? Every evening?

2 A. Yeah. If they're on the road and they have to stop, they
3 do a layover, yes.

4 Q. Okay. And fueling, that would be one of those events
5 that's not every day. It's two or three times a week; correct?

6 A. I don't know how often fueling occurs for everybody, so
7 I'm not sure.

8 Q. Amongst the transcripts that you read from the trial
9 testimony here this week, did you read the drivers' testimony
10 of those who have testified before the jury here in the last
11 two and three weeks?

12 A. Yes. I mean that's the issue. That --

13 Q. No. The question is: Did you read them?

14 A. Yes, I did.

15 Q. Okay. Thank you.

16 And did you see any drivers who testified to not fueling
17 at least every week?

18 A. I don't recall. I don't recall one way or the other.

19 Q. Did you see any drivers testifying to not fueling twice a
20 week?

21 A. Again, I just don't recall specifically what drivers said
22 at trial about how often those drivers refueled on average.

23 Q. And you criticized Dr. Phillips for using the
24 questionnaire -- the question statements regarding frequency of
25 fueling; correct?

1 **A.** Could you repeat that?

2 **Q.** Did you criticize earlier, in response to your examination
3 by Mr. Edelman, Dr. Phillips for having relied upon the
4 questionnaire answers regarding frequency of fueling?

5 **A.** He didn't rely on the questionnaire answers.

6 Dr. Phillips relied upon what he called his hybrid data,
7 which is a combination of questionnaire responses and his
8 interpretations of depositions. And I just don't remember
9 specifically about fueling, whether they were deposition
10 responses included in the hybrid data or whether it was all --
11 I'm sorry, questionnaire responses included in the hybrid data
12 or whether it was all deposition.

13 **Q.** In your review of the transcript of Dr. Phillips'
14 testimony last week, did you notice where he testified that he
15 utilized the Gasboy data for determining the frequency of
16 fueling?

17 **A.** Yes.

18 **Q.** And that was the only data he utilized for the frequency
19 of fueling? Did you notice that?

20 **A.** In the numbers that he gave to the trial, yes, I did.

21 **Q.** Okay. So let's go down the list here while we are going
22 through this of what issues or what claims the plaintiffs are
23 making that Dr. Phillips in fact utilized that survey that you
24 found confusing, some of the drivers found confusing and I
25 think we can all agree, it was somewhat confusing. Let's see

1 where he used it.

2 Do you believe that Dr. Phillips utilized the survey --
3 the questionnaires that were given out to the drivers before
4 their depositions in determining any data regarding -- any
5 claims regarding layovers?

6 **A.** No.

7 **Q.** For the layovers, he utilized only the hard data, the
8 electronic data, produced by Wal-Mart in electronic form for
9 its payroll and dispatch records; correct?

10 **A.** Well, no. He also used assumptions about, you know, how
11 many much time was spent in the trucks.

12 **Q.** Let me be more specific. In terms of the number of
13 layovers for which claims -- data and loss estimates were
14 provided, did you utilize only the hard data, the electronic
15 data?

16 **A.** Yes.

17 **Q.** Okay. So the questionnaire had no influence on the
18 layover loss estimate regarding frequency of it occurring;
19 correct?

20 **A.** That's correct.

21 **Q.** And with regard to the rest break claims that the
22 plaintiffs are making for not being paid for their rest breaks,
23 did the frequency of rest breaks occurring come solely from the
24 hard data, the electronic data, that Dr. Phillips was provided
25 by Wal-Mart?

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1 **A.** Yes, it did.

2 **Q.** And with regard to the pre-and post-trip inspections, do
3 you agree that the frequency of pre- and post-trip inspections
4 occurring was determined by Dr. Phillips based solely upon the
5 hard data from the electronic payroll information provided to
6 him?

7 **A.** And some, what I think, are reasonable assumptions, yes.

8 **Q.** And we talked briefly already about the fueling and the
9 use of the Gasboy. I can't -- I know I asked you this, I'm not
10 sure whether you agreed.

11 But you did see that Dr. Phillips testified that he relied
12 upon the Gasboy data only for determining the frequency of
13 fueling at Wal-Mart DCs for all of the drivers; correct?

14 **A.** Hum --

15 **Q.** With extrapolation back for the years that didn't exist?

16 **A.** Yes. Once you throw in the extrapolations, the numbers
17 that he presented at trial were exclusively based upon Gasboy
18 in terms of frequency, yes, for fuelings at Wal-Mart
19 distribution centers.

20 **Q.** And with regard to washing of the trucks, in your review
21 of the various pay manuals -- and I take you did review
22 Wal-Mart's pay manuals; correct?

23 **A.** I did, yes.

24 **Q.** In your review of those pay manuals, did you notice that
25 the driver pay manuals instruct the drivers to wash their

1 tractor at least once per week?

2 **A.** I saw that. I don't remember whether that was in all of
3 the pay manuals. I did see it in at least one pay manual, yes.

4 **Q.** With regard to the time spent weighing the tractors, first
5 of all, going back over the ones we've just talked about, for
6 any of the ones we've just talked about, did you see

7 Dr. Phillips in his testimony relying upon any of the
8 questionnaire answers that were given by the drivers prior to
9 their depositions being taken? That would be the pre-trip, the
10 post-trip, the washing, the fueling, and the rest breaks.

11 **A.** Your question is did he rely on the questionnaire
12 responses for anything?

13 **Q.** Yes. For any of those in terms of frequency occurring.

14 **A.** In terms of frequency only or in terms of his loss? I
15 thought the first question was loss. Is it frequency only or
16 what's the question?

17 **Q.** Okay. Start with frequency.

18 **A.** I think not. I think that the -- those were just
19 assumptions about what everybody does.

20 **Q.** Okay. And the loss estimates attributed to those claims,
21 did he rely upon the surveys in any manner in making his
22 determination that were testified to last week?

23 **A.** Yeah. My recollection -- I don't -- I mean, sir, there
24 are a number of estimates and they're all confused in my mind
25 of things that he did and the ones he actually testified to.

1 I think that the Gasboy -- the duration, the length of
2 time that each refueling took was based upon the extrapolations
3 from the hybrid data which would have included both -- might
4 have included both survey responses and deposition testimony.
5 But I don't remember the specifics of what he ultimately
6 testified to at trial as opposed to other analyses that he did,
7 but I think that that's the case.

8 **Q.** When you refer to hybrid data, is that in your mind what
9 you are saying is essentially the depositions and then the --
10 beginning with the questionnaire and then estimates given for
11 duration that came about and were talked about in the
12 depositions as well?

13 **A.** Yes.

14 **Q.** And do you recall Dr. Phillips testifying that where they
15 had a number in the depositions, which were -- you understand
16 those were cross-examination depositions with counsel from both
17 sides present?

18 **A.** Yes. Both sides were present.

19 **Q.** And both sides got a chance to question all of the
20 witnesses under oath in front of a court reporter, as you said,
21 just like here except in a conference room.

22 **A.** Yes.

23 **Q.** So each side had a chance to question the witnesses.
24 Those were the depositions you're talking about; right?

25 **A.** Yes.

1 Q. And in those depositions, many of the people, not all of
2 them, I agree, but many of the people were asked for duration
3 on many of these tasks; correct?

4 A. Yes.

5 Q. And did you notice in the testimony given by Dr. Phillips,
6 that whenever there was a number given in the depositions,
7 which were the cross-examinations, he relied upon or his -- his
8 instruction was to rely upon the deposition as the most
9 credible number given that there was cross-examination by both
10 sides?

11 A. If you leave out the "given" part, yeah, I remember. I
12 don't know whether he said "given." But I know that he said --
13 I saw the instructions, that they were to rely on the
14 deposition testimony to the extent there was a conflict between
15 the deposition testimony and the questionnaires.

16 Q. Okay. Now, what about for the driver coordinator
17 meetings, beginning of the day and the end of the day, did you
18 see in the testimony given by Dr. Phillips that he relied upon
19 the deposition estimates for the frequency and duration of
20 those occurring?

21 A. Well, the hybrid data. My recollection was that he relied
22 upon the hybrid data that we're talking about, the averages, to
23 extrapolate from the 39 to the 800.

24 Q. And, again, to the extent there were numbers in both the
25 deposition and in the questionnaire, he relied upon the

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1 deposition which was the subject of cross-examination by
2 counsel for both sides; correct?

3 **A.** Well, those were the instructions. The instructions were
4 not followed in every case. I don't know that I would say that
5 that's the case.

6 **Q.** You gave us a few examples where perhaps the instructions
7 were not followed. Is it your testimony that there are others
8 that you just haven't brought to our attention?

9 **A.** My recollection is that there were others, yes, but I
10 didn't create a comprehensive list.

11 **Q.** Okay. So the ones you know of are the ones you testified
12 to?

13 **A.** The ones I specifically cited and included in my report to
14 illustrate the phenomenon are the ones that I can testify
15 about, yes.

16 **Q.** And the CHP, Department of Transportation inspections, for
17 that, Dr. Phillips also relied upon the hard data which are the
18 reports that were produced by Wal-Mart after the original
19 reports were all generated in this case; correct?

20 **A.** He relied upon the CHP data, yes.

21 **Q.** That was data that was provided by Wal-Mart through
22 pretrial discovery, but provided after the original reports
23 were created; correct?

24 **A.** I don't know when everything was turned over to you. I
25 know I got it after I -- I got it after the reports were done.

1 Q. I think you can assume we didn't get it any sooner.

2 Do you have any reason to believe that plaintiffs got that
3 before you did?

4 A. I don't know.

5 Q. Okay.

6 Now, you had some criticism or some comments on the
7 accuracy of the testimony that was given earlier before the
8 data was provided and relied upon from the CHP. I want to talk
9 about that briefly.

10 This is page 22 of the defendant's presentation. And I
11 don't -- let's see. Hopefully everybody can see it a little
12 bit.

13 On the left-hand side is what you testified was
14 information generated by the DOT/CHP reports; correct?

15 A. Yes.

16 Q. On the right-hand side was trial testimony given by the
17 same people literally in the last two weeks here in court;
18 correct?

19 A. Yes.

20 Q. Now, in the CHP reports, which you have shorter durations
21 on for most of the instances, do you know whether the CHP is
22 measuring time spent by a driver waiting to eventually get to
23 the CHP officer who is going to do the inspection?

24 A. No. I don't -- I don't know that there's not some wait
25 time to add to this.

1 Q. And, in fact, you would agree with me that the officer --
2 we've all dealt with officers in one way or another at some
3 point in our lives -- they would not have been measuring the
4 time that someone was waiting to talk to them correct?

5 A. I don't know. I mean, you'd have to ask the officers.

6 I know that these are the data that Dr. Phillips relied
7 upon. These measurements from DOT/CHP, that this is
8 purportedly measuring what he said is relevant and so I used
9 that. That's what Dr. Phillips used and so I looked to see
10 whether Dr. Phillips data matched up with what people said.

11 But I wasn't there. I don't know, you know, what the CHP
12 officers said or did.

13 Q. You would agree that there is not much reason to assume
14 that an officer would have been counting the time when someone
15 was waiting, parked in their truck, to move up to eventually
16 become inspected; correct? That wouldn't be logical?

17 MR. EDELMAN: Objection. Calls for speculation.

18 THE COURT: Overruled.

19 You can answer.

20 THE WITNESS: I don't know. I don't know that there
21 was any wait time. I don't know that a CHP officer who is
22 writing down the time is basing it upon the moment where he
23 waved someone over or whether it starts sometime later. I
24 don't know.

25 All I know is that these are the data Dr. Phillips relied

1 upon and we can compare what the data say to what the deponents
2 actually said when they were at trial.

3 **BY MR. SALTZMAN:**

4 **Q.** So, in fact, Dr. Phillips relied upon not the larger
5 estimates that were given at trial, but the more conservative
6 smaller estimates, statements of time written down by officers
7 on an inspection report; correct?

8 **A.** I don't know that I could say they are more conservative.
9 They are the objective data that we have and those are the ones
10 that Dr. Phillips relied upon for this purpose.

11 **Q.** So he didn't rely upon memory in any manner for this. He
12 went by hard data that was produced by Wal-Mart that Wal-Mart
13 got from the CHP?

14 **A.** For purposes of this calculation, yes, he did.

15 **Q.** Okay. Now, with regard to wait time, you mentioned that
16 Dr. Phillips calculated a 45 minute per week wait time for each
17 driver for their potential loss in this case; correct? That's
18 what you understood him to do?

19 **A.** I do not understand that he calculated a wait time. He
20 assumed that every driver had 45 minutes of wait time per week
21 and he conducted calculations that were based on that
22 assumption, yes.

23 **Q.** Okay. And, again, you reviewed his transcript from last
24 week?

25 **A.** I did.

1 Q. You didn't see him actually testifying that he didn't have
2 an estimate, but gave a 45 minute value for that -- if it was
3 45 minutes, this is what it would be worth?

4 A. I don't know that I would have paid any attention to a
5 distinction like that. He might have said something like that.
6 But he presented numbers that were based upon the assumption
7 that there was 45 minutes of wait per week.

8 Q. In fact, he presented a number that was a little over two
9 millions dollars for that based upon 45 minutes being the
10 number, but in fact testified he was not offering a number.
11 You don't recall that?

12 A. I -- to me, it's -- he gave a number that is two million,
13 but he wasn't testifying it was two million. He gave the
14 number and that number was based upon 45 minutes.

15 Q. Okay. And he did not rely upon the questionnaire for that
16 45 minutes; correct, since he said he was not giving a number.
17 He was giving a value for that? So, again, the survey did not
18 come into play -- the questionnaire did not come into play in
19 any way; correct?

20 A. Yeah. That's right. That was based just upon an
21 assumption that it's 45 minutes, without regard to the
22 questionnaire or the deposition testimony or anything anybody
23 had said about what they really did.

24 Q. So you spent approximately two and a half hours of
25 examination this morning and early this afternoon basically

1 attacking the questionnaire, yet in going through everything we
2 just went through, it essentially wasn't used at the end of the
3 day by Dr. Phillips. You agree?

4 **A.** No. We spent a lot of time this morning talking about the
5 differences in experiences about -- among all the class
6 members. And there were lots of data that tended to go towards
7 that.

8 And one of the uses for the questionnaire is to show that
9 basically people thought that they had a wide disparity of
10 experiences. And whether or not Dr. Phillips used it, this was
11 evidence that people's circumstances and what they do varied on
12 a day-to-day. I think we spent a lot of time this morning
13 talking about that.

14 And that implied that you would end up with grossly
15 inaccurate estimates of people's losses if you took any fixed
16 number, whether it was the average that you got from surveys or
17 from hybrid data or whether it's just an arbitrary number, like
18 45 minutes or 15 minutes or something else. And you would get
19 wildly unreliable estimates if you were to use that to estimate
20 damages for the class once you looked at these things on an
21 individual basis.

22 We also spent a lot of time talking about how unreliable
23 memory is generally, and whether or not Dr. Phillips relied on
24 it for every one of his damages estimates, he was relying on it
25 for many of them.

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1 So we talked about a variety of things this morning. We
2 talked about how trips aren't typical and usual. We talked
3 about --

4 **Q.** Sir.

5 **A.** -- Dr. Phillips' own estimates about how reliable or
6 unreliable his estimates were.

7 So, no, I did not spend all this morning or two and a half
8 hours talking exclusively about a questionnaire. I talked
9 about arbitrary assumptions; I talked about the fact that the
10 group of people that he relied upon was not statistically
11 reliable; I talked about, again, typical is not normal. So
12 there were a lot of things that we talked about.

13 **Q.** Let me ask you about this: Memory about frequency of
14 duration is unreliable.

15 **A.** Yes.

16 **Q.** So drivers do a pre-trip every single day; right?

17 **A.** They're supposed to. I don't know whether they do. I
18 imagine most do every single day. Just based on people and
19 large numbers, I imagine that some people don't do it some
20 days. But generally speaking, they're supposed to and my guess
21 is that they do.

22 **Q.** And they do a post-trip or they are supposed to do a
23 post-trip every single day and fill out the DVIR form?

24 **A.** Well, again, I don't recall the DVIR form. I have no
25 reason to doubt you about that.

1 Q. So with regards to that task, most of these drivers have
2 been very experienced. The jury has heard from 10 or more,
3 maybe 12 have come in. They are all pretty experienced
4 drivers; right?

5 A. It's my understanding, yes, that the Wal-Mart drivers are
6 particularly experienced.

7 Q. They have come into court and they were brought into
8 depositions and they testified about events that they have done
9 literally every day, specifically the pre- and post-, for 5,
10 10, 15, 20 years of their lives, five days a week.

11 Can you tell me, do you believe, sir, that that type of
12 event is subject to the recall problem that your example
13 mentioned earlier about asking people how many hours work they
14 did a year ago? Do you see any correlation between asking
15 someone what -- how many hours they worked a year ago and
16 asking them how long it takes or how frequently they do
17 something that they do every single day of their work life?

18 A. Well, yeah. I mean, the -- the research that I was
19 talking about, the -- what about a year ago, that was one
20 example. That was one example of lots of different types of
21 research into this area.

22 Some of it talks about, you know, how frequently do you
23 take medications that are really important to you and that
24 you're taking all the time.

25 And in this case regarding pre-trips, as you said, the

1 pre-trip was based on an arbitrary assumption. That was the
2 second type of --

3 **Q.** What's the arbitrary assumption? Remind me, please.

4 **A.** Every pre-trip took 15 minutes per person every shift. So
5 Dr. Phillips' assumption is now regarding pre-trips in
6 particular and post-trips in particular was based on an
7 arbitrary assumption that each pre-trip and each post-trip took
8 15 minutes for each person all the time. That assumption was
9 inconsistent with what all of these people said was their
10 typical -- not everybody. Some people said 15, but it was
11 inconsistent with what many people said about how much time
12 they actually spent on pre-trips.

13 **Q.** Sir, did you look at the deposition averages of the people
14 with regard to the duration of pre-trip inspections and the
15 conclusion Dr. Phillips offered at least from the depositions
16 that it was 14.5 minutes, so it was a half minute shorter than
17 what he ultimately used which was the 15, did you see that?

18 **A.** I saw his testimony on that, yes.

19 **Q.** So you did see -- you said it was an arbitrary assumption
20 except the depositions yielded a number of 14.5 minutes. You
21 saw that, right?

22 **A.** I saw that the hybrid data had an average of something
23 like 14 minutes, but he didn't use 14 minutes. He used the 15
24 minutes.

25 **Q.** Did you read the testimony of the various drivers who

1 testified here in court over the last two and a half weeks --
2 did you review their testimony for the average duration of a
3 pre-trip inspection?

4 **A.** Again, I've read lots of trial testimony and transcripts
5 from different deponents about the amount of time that they
6 spent on pre-trips, and I don't have it all segregated in my
7 mind who testified at a deposition and who testified at trial.
8 But people testified to lots of different numbers, which you
9 show which I can see when I actually plot it out on graphs and
10 they were not all consistently 15 minutes. And that was why
11 the 15 minutes is an arbitrary assumption.

12 **Q.** You wouldn't expect everybody to testify to the exact same
13 number, would you? That would be -- that would be pretty much
14 impossible; correct?

15 **A.** If it's the --

16 **Q.** For everybody to come in and say exactly the same number?

17 **A.** If it were the case that it were a rote activity -- I
18 mean, that's the point. It's not a rote activity. Different
19 people spend different amounts of time on these different
20 tasks, and I don't know whether -- on average. At least based
21 on what they say.

22 I don't know that it's even a consistent time on pre-trips
23 of across a given person. I don't know that it doesn't vary
24 based upon the nature of the trip that they just ended or the
25 nature of the trip that they are going to go on or how much

1 sleep they got last night. But what I do know is that people
2 didn't say that they were all 15 minutes.

3 **Q.** I agree with you. We found agreement.

4 **A.** Some people said it was much longer; some people said it
5 was much shorter.

6 And the 15-minute number that Dr. Phillips relied upon, it
7 wasn't based on the hybrid data. As he said, it just so
8 happened that the 15 minutes was close to the average from the
9 hybrid data.

10 **Q.** So 14 and a half wasn't close enough to 15, plus all the
11 testimony of the drivers that were here, but you don't have
12 their numbers in your mind; correct? I guess the jury took its
13 notes and we'll hear what they have to say on that.

14 **MR. EDELMAN:** Objection, Your Honor. Argumentative.
15 There is no question there.

16 **THE COURT:** Yes. We don't need editorials.

17 **MR. SALTZMAN:** Thank you.

18 **Q.** Did you also see that Dr. Phillips, just like he had done
19 with the waiting time, for each of the events that we're
20 talking about like pre-trip and post-trip, in addition to the
21 average -- or to the numbers he had for frequency and duration
22 which led to his loss calculations, did you see that he also
23 gave a per-minute calculation for each of those events?

24 **A.** Yeah. That was not in his report. Some of them were,
25 but, yes, there were per-minute calculations that I had never

1 seen that I've not had a chance to review that were presented
2 at trial and that were not part of his report. I did see that.
3 I took note of that for that reason.

4 **Q.** Did you see that he testified that if the average duration
5 he had concluded was not accepted, that it was possible just to
6 take that one-minute number and multiply it by whatever the
7 trier of fact felt was the right number to arrive at a damage
8 total for each of these tasks?

9 **A.** I wouldn't be surprised if he said that. I don't know
10 exactly what he said, but he may have.

11 **Q.** You don't recall?

12 **A.** I don't recall specifically what he said about the one
13 minute, but if you say that's what he said, I don't have any
14 reason to doubt you.

15 **Q.** Now, for all of the tasks we're talking about -- I can
16 keep listing them until we get comfortable and we have got them
17 all in our minds.

18 For the pre-trip and post-trip, you agree Wal-Mart has no
19 electronic record or even a hand record that it's produced to
20 the plaintiffs that would track how long those events took;
21 correct?

22 **A.** Not that I know of. That's right.

23 **Q.** Right. And there is no record of the length of the CHP --
24 well, actually it did. It did produce these records we've
25 talked about from the CHP; correct? So for that, we have a

1 real record.

2 A. Yes. There is CHP data.

3 Q. That's what Dr. Phillips relied upon, agreed?

4 A. That there is CHP data that he relied upon and also
5 extrapolated other people, yes.

6 Q. The washing of the trucks, would you agree that Wal-Mart
7 has not produced and, to your knowledge, doesn't have any data
8 that shows how long it took -- how frequently they washed and
9 how long it took to do that task?

10 A. To my knowledge, yes, that's right.

11 Q. Wal-Mart has not produced and you have not seen any data
12 that shows how long it took to fuel and how often they
13 fueled -- well, we don't know how long but we know how often,
14 at least, for the Gasboy, three years; correct?

15 A. For the Gasboy, yes, we know and for others we do not.

16 Q. So for the Gasboy, we know how often for three years which
17 has been extrapolated. But we do not know the duration.
18 Wal-Mart did not track that; correct?

19 A. As far as I know, Wal-Mart did not track that.

20 Q. And Wal-Mart did not track the duration of the driver
21 coordinator meetings; correct?

22 A. That's as far as I know, correct, yes.

23 Q. Now, Wal-Mart does have in every tractor a -- what's
24 called an onboard computer, right, an OBC?

25 A. Yes.

1 Q. Can you tell us what an OBC is to your knowledge?

2 A. Onboard computer.

3 Q. That computer has some codes built into it, right, there
4 are activity codes it has built in?

5 A. Yes.

6 Q. Do you know whether Wal-Mart has ever attempted to add
7 additional codes, for example, like a pre-trip inspection code,
8 so that before the driver did that, he could -- he or she could
9 literally press the button, put in a code, go do the pre-trip
10 and then press a button when it's concluded?

11 A. I don't know.

12 Q. Do you have any reason to believe that that system, the
13 Qualcomm onboard computer system built by Qualcomm computer
14 company, has the ability to add that code into it?

15 A. I don't know one way or the other.

16 Q. What about a post-trip inspection? Is there any code
17 built into the system so that the drivers could track the time
18 they spend doing a post-trip inspection?

19 A. Not to my knowledge.

20 Q. And what about rest breaks? Is there a rest break code?
21 Have you done other trucking cases?

22 A. Yes, I have.

23 Q. Are you aware that some companies have codes for rest
24 breaks?

25 A. I'm not aware.

1 Q. Okay. Does Wal-Mart have a code for rest breaks in its
2 onboard computer system?

3 A. Not to my knowledge.

4 Q. Does Wal-Mart have a code in its system for CHP,
5 Department of Transportation inspections?

6 A. Not to my knowledge.

7 Q. Does Wal-Mart have a code in its system for the washing of
8 the tractors?

9 A. You mean a code in the Qualcomm computer?

10 Q. Yes. In the Qualcomm computer created by Qualcomm
11 computer software company in San Diego.

12 A. Not to my knowledge.

13 Q. Okay. Does it have a code for when the weighing event is
14 taking place off-site?

15 A. Not to my knowledge.

16 Q. Does it have a code for the fueling? It has the Gasboy
17 for when they go do it. Does it have a code for how long that
18 takes?

19 A. Not to my knowledge.

20 Q. And for the driver coordinator meetings, does it have a
21 code for that?

22 A. No, not to my knowledge.

23 Q. Now, for the layovers it has a code; right?

24 A. Yes.

25 Q. So the driver can press a button and go into layover mode

1 and the company knows that; right?

2 A. Yes.

3 Q. Now, if Wal-Mart had codes for the events I just talked to
4 you about, we wouldn't be having this discussion about how to
5 calculate the time spent; correct?

6 A. I doubt it, but, yeah, I don't know. That's a
7 hypothetical -- based on some hypothetical world, but I doubt
8 it.

9 Q. We would not be having this discussion; right?

10 A. Not this exact discussion, no.

11 Q. I want to show you this chart. It's Figure No. 12 on page
12 13 of the earlier presentation. This one deals with the
13 end-of-day meeting per 10 trips; correct?

14 A. Yes.

15 Q. And the highlighted section shows a low confidence level
16 of \$810 in potential loss and a high of \$118,000 in loss;
17 right?

18 A. Yes.

19 Q. That's not for one individual driver supposedly?

20 A. Yes.

21 Q. Tell me and tell the jury as well, if you could, what that
22 means on the low end, what does that mean for that driver?

23 A. What do you mean what does it mean?

24 Q. How was that number arrived at?

25 A. Through this Monte Carlo analysis.

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1 Q. Which you're familiar with; right?

2 A. I'm familiar with Monte Carlo analysis, yes.

3 Q. Do you use it?

4 A. Not very much, no.

5 Q. So tell me how that number is arrived at for an individual
6 driver.

7 A. How Dr. Phillips arrived at that number?

8 Q. How the Monte Carlo system arrived at that number.

9 A. Well, the way that Dr. Phillips arrived at that number was
10 through resampling. And so he had a number of -- he had a
11 certain sample from his hybrid data regarding end-of-trip
12 meetings and he had, as I recall, samples both for the number
13 of meetings per 10 trips and then he had people who had
14 answered how long those trips take, and so to determine for
15 this person how long were his end-of-day meetings, he sampled
16 from his 39 people or however many people answered the
17 question. He reached into the urn, he pulled out a number for
18 how many trips per week there are. And then he wrote that
19 number down or the computer actually did. He repeated that
20 process a thousand times to get an estimate and then that gave
21 him a thousand different estimates.

22 He actually simultaneously had reached into the urn to
23 determine for each one of the trips how long does it take? So
24 he has got a length of time and a number of instances and he
25 repeated this a thousand times to get a thousand different

1 estimates of the amount of time spent on these meetings. And
2 then he attached a dollar value to them, so he had a thousand
3 different estimates about what damages are.

4 And then he took the -- the 5 in terms of the 5 of the
5 smallest. That was the lower limit for the confidence range.
6 He took the 5 that were the highest. That was the upper limit
7 for the confidence interval. And that's the interval for his
8 damages for this particular category of damage.

9 Q. That's one individual from the, what, 40 or from the 840?

10 A. This is from the 800.

11 Q. Okay. So from the 800 plus.

12 So if the high-end number is \$118,000 and that number had
13 been relied upon in ultimate damage calculations, with 840
14 people at \$118,000 -- and I can represent to you I did the math
15 a few minutes ago, that would yield \$99 million in damages for
16 that one claim. Do you agree with -- you can follow that math,
17 right, 840 times 118,000?

18 A. It would have been close to a billion dollars.

19 Q. I did it wrong then? A billion dollars? I have 99
20 million in my math.

21 A. Maybe you are right. Maybe I did it wrong in my head.

22 Q. Do you know what the actual claim was for loss for the
23 entire class of 840 people for that particular end-of-day
24 coordinator meeting?

25 A. I have not memorized all of Dr. Phillips' calculations,

1 no.

2 Q. I'm putting up before you -- this is a handwritten chart
3 that my co-counsel, Mr. Artenian, wrote up last week when he
4 was questioning Dr. Phillips. So if you -- you read
5 Dr. Phillips, you would have seen all these numbers being
6 talked about before they got written on the sheet by
7 Mr. Artenian. Okay.

8 So the driver coordinator end-of-day meetings towards the
9 bottom, and it says \$3,875,116, plus for the last -- the
10 earliest year, \$438,009. Together, those numbers total a loss
11 of \$4,313,000 and change, agreed?

12 A. Yes.

13 Q. Okay. So you have criticized or critiqued the system and
14 the formula that would yield a high of 118,000 and a low of
15 \$810, but in fact when that system was concluded with its work
16 on the global class-wide level, it produced a number of 4
17 percent of what you have shown as the extraordinary, as you
18 called it earlier, the highest possible. I think you referred
19 to that earlier in direct exam. So it didn't yield 118,000
20 times 840. It yielded \$5,134 per all 840 people, if it was
21 applied equally to everybody, agreed?

22 A. Well, there are a lot of numbers that you threw out there
23 that I have not analyzed or paid any attention to before. I
24 never --

25 Q. I will break it down for you then. I will do it more

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1 slowly. I'm sorry. That wasn't fair.

2 **MR. EDELMAN:** I would ask that the witness be allowed
3 to complete his answer.

4 **THE COURT:** You can complete your answer short.

5 **THE WITNESS:** Just that I had never said that the
6 damages were 800,000 times -- whatever the number was times
7 800. That's not something that I did nor is it something that
8 I said should be done.

9 **BY MR. SALTZMAN:**

10 **Q.** Okay. But you did highlight that number of 118,000 and
11 talked about it for quite a while this morning. It's on --
12 that was as to one individual that eventually got fed into the
13 entire system and yielded a global number for the class for
14 that claim of 4,313,000, which is in front of you on the screen
15 right now, the combination of the two subtotals for that claim;
16 correct?

17 **A.** Again, that's a pretty long story. The 800,000 -- I'm
18 sorry, the 118,000, yes, it's a number that has to do with the
19 reliability of an individual's damages estimate. Yes. And
20 when you average everything out, you don't just add up all the
21 highs of the damages intervals or add up all the lows.

22 And also the reliability of the group is going to be more
23 than the reliability for any individual because the
24 overstatements by thousands or tens of thousands will be offset
25 by understatements for other people by thousands or tens of

1 thousands. So I'm not sure what the question actually was
2 other than are those numbers around and the answer is yes.

3 **Q.** You actually mention -- that was going to be my next
4 question. Do you know what the margin of error was for this
5 claim for the class once the Monte Carlo finished its work as
6 opposed to any one individuals with these extraordinary highs
7 and lows that the computer created -- do you know what the
8 margin of error was for the class on that claim?

9 **A.** Well, there are two things.

10 What Dr. Phillips calculated from the margin of error, I
11 don't remember, but he calculated it.

12 The actual margin of error is not something that he
13 calculated or could calculate because the actual margin of
14 error has to incorporate all of the other errors besides the
15 errors that are merely due to the fact that people have grossly
16 dissimilar circumstances. So the actual margin of error has to
17 somehow account for the potential that people are not
18 remembering correctly. It has to account for all of the other
19 types of errors. And I don't even know how you would go about
20 calculating a margin of error under those circumstances.

21 **Q.** And you are assuming error when you talk about not
22 remembering, for example, how long things take that people do
23 every day of their working lives. You're assuming there is an
24 error in that as opposed to that number being a reasonable
25 estimate offered by each of the class members?

1 You don't -- is it your testimony that a class member
2 cannot give a reasonable estimate of how much time they take
3 doing a pre-trip inspection? Is that your ultimate testimony?

4 **A.** I'm saying that a class member's estimate of the usual
5 amount of time for a post-trip inspection, which wasn't used by
6 Dr. Phillips in the numbers he presented here in any way, he
7 just said 15 minutes, but I'm saying a class member's estimate
8 of the usual amount of time on post-trip or pre-trip
9 inspections over a 12-year period, or for some class members
10 over maybe a year period that was 10 years ago, may or may not
11 be accurate. I don't know that these pre-trip inspections and
12 post-trip inspections -- that's not something we really
13 got into.

14 **Q.** I'm sorry --

15 **A.** It wasn't something that they got into about whether those
16 tended to be the same all the time. I know they're not the
17 same from person to person. I don't know whether they're
18 consistently the same for every pre-trip and every post-trip
19 that everybody engages in.

20 And if they do engage in them every day, but they vary, so
21 that they're not all 5 minutes. Sometimes they're 5; sometimes
22 they're 10; sometimes they're 7; sometimes they're 20. I'm
23 saying that someone's estimate about what it usually is is
24 likely to be unreliable because all of the studies I have ever
25 read where it's ever been tested, it's proven to be unreliable

1 and it's tended to be overstated.

2 Q. You had a chance to review all of the Wal-Mart payroll
3 dispatch data that they provided to you; correct?

4 A. Yes, I did.

5 Q. In reviewing that data, the electronic payroll data, am I
6 correct that the records you reviewed did not show any separate
7 payments for any of the tasks we're talking about here in terms
8 of payroll being paid to the employee for the time spent doing
9 a pre-trip inspection? That does not exist in the payroll
10 data; correct?

11 A. There is no separate payment, separate activity code
12 for --

13 Q. Right.

14 A. -- for pre-trip inspection.

15 Q. Am I correct that there is no separate activity code by
16 which a driver could be paid for a post-trip inspection in the
17 payroll data?

18 A. That's right.

19 Q. And am I correct, same question, as to each of the tasks
20 we're talking about, that there is no payroll -- and you've
21 reviewed all the payroll data. There is no way they can be
22 paid in the system that Wal-Mart has on a separate payment for
23 the time spent doing fueling; correct?

24 A. Well, there is no code in the activity -- I'm sorry, in
25 the payroll data, but they sometimes are paid separately for

1 various of these tasks through the T-pay system.

2 Q. Through the T-pay discretion?

3 A. Through the T-pay system, yes.

4 Q. How many instances did you see in the T-pay discretionary
5 system of any employee -- any driver being paid for fueling,
6 pre-trip or post-trip.

7 A. I don't know. I mean, the entries do not allow you to go
8 and add up what every payment is for.

9 Q. You didn't see the category of other where it describes
10 what the payment is for?

11 A. If I could finish. Many payments are either miscellaneous
12 or make whole, so you can't tell what they are all for. I did
13 see some instances for some specific things that are at issue
14 here, but it's not possible to go through and add up all the
15 instances where there was a payment for something at issue here
16 because there are these miscellaneous categories and you don't
17 know what it's for.

18 Q. When we had your deposition two months ago, you had not
19 reviewed the discretion pay -- T-pay at that point to be able
20 to answer that question I just asked you, had you?

21 A. I probably hadn't.

22 Q. Okay. And so now you knew this was coming and you still
23 looked at it and you cannot tell anybody, from what you did
24 review, how often you saw payments for pre- or post-trip
25 inspections or fueling or washing or inspections or weighing;

1 is that correct?

2 A. Yeah. I mean, I still have not looked to try to do those
3 things. I just said you can't -- you can't get an exhaustive
4 list that way because there are entries in the data set that
5 are just miscellaneous or make whole and you can't tell what
6 they actually are. But, no, I never tried to do that --

7 Q. Fair enough.

8 A. -- either before or after my deposition.

9 Q. Now, with regard to rest breaks. Let's talk about that
10 for a few minutes. You talked about earlier some of the rest
11 breaks perhaps occurring when a driver was on an activity code
12 where he or she was being paid; correct?

13 A. Yes.

14 Q. Are you familiar with California law regarding rest
15 breaks, that they are supposed to be off duty, fully relieved
16 of all responsibilities?

17 A. I'm aware of that language, but I'm not a lawyer. I can't
18 interpret exactly what it means.

19 Q. Well, when a driver is receiving any one of the activity
20 codes that the jury has seen for the last two and a half weeks,
21 they're on duty receiving payment for whatever task is in that
22 activity code; correct?

23 A. That gets into sort of legal analysis about what on duty
24 actually means for purposes of the California Code.

25 I don't know. I'm not a lawyer. I don't know whether --

1 and I assume you'll make the legal argument, that if you're
2 waiting, that counts as on duty. I don't know.

3 Q. You're not a lawyer and you can't give that
4 interpretation, but you gave an interpretation of what the
5 class members said in their depositions; correct?

6 A. That's what they said. They said that they were engaged
7 in these activities while they were on unscheduled time, which
8 is time when they're just getting paid by the minute. They
9 said that they engaged in these activities when they were doing
10 live unload, which is basically wait time while the truck is
11 being unloaded. They said that they were engaged in these
12 activities --

13 Q. Do you know whether --

14 A. -- when they were engaged in live load. That's what they
15 said and that's what I reported.

16 Q. Do you know if any of the drivers whose depositions you
17 read are attorneys?

18 A. I doubt that they're attorneys.

19 Q. Do you know if they are any better qualified to answer
20 this on-duty versus off-duty question than you are sitting here
21 today?

22 A. I -- I don't know one way or the other.

23 Q. And you've been involved in litigation now for 20, 30
24 years?

25 A. Boy, yeah.

1 Q. Twenty years at least. Sorry --

2 A. No. No. It's close. I've been -- I've been involved
3 in -- with the EI for 26 years, and there has been a case at
4 least per year for that time where I have been involved --

5 Q. You have been involved in employment cases; right?

6 A. Yes.

7 Q. You have been involved in meal or rest break cases;
8 correct?

9 A. Yes.

10 Q. So you have at least a working knowledge, a lay person's
11 working knowledge of all the terminology involved in meal and
12 rest breaks; right?

13 A. On this issue about whether -- if you're waiting and
14 you're being paid for waiting, whether that can count as a rest
15 break time, I would have assumed so.

16 I -- when I think about the average -- you know, work and
17 how it happens, I assume that's the case, but it's not come up.
18 As I said, I'm not a lawyer, but it -- I would imagine, you
19 know, if you're being paid and you take a break, that that
20 counts. But I'm not a lawyer and I didn't -- you know, I don't
21 purport to be.

22 Q. You understand that truck drivers' time is highly
23 regulated during the day in terms of they are allowed to be
24 driving for 11 hours, they are allowed to be off duty -- I mean
25 on duty but not driving for 3 more hours. They have 14 hours

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1 available to them to work and make money; right?

2 **A.** That's my understanding, yes.

3 **Q.** When they go on rest breaks, if they are were getting a
4 legal and proper rest break, they would code off duty; correct?

5 **A.** That's my understanding, yes.

6 **Q.** So if they're on duty and receiving activity code pay,
7 they cannot at the same time be off duty and getting an
8 off-duty meal break that does not take away time from their
9 workday; correct?

10 **MR. EDELMAN:** Objection. Calls for a legal
11 conclusion.

12 **THE WITNESS:** You also said something about meal
13 breaks.

14 **THE COURT:** You said meal break.

15 **MR. SALTZMAN:** I'm sorry to everybody. It's a little
16 late for me, too.

17 **Q.** I'm talking about rest breaks only. So if a driver
18 goes -- if they are going to get the most time they're entitled
19 to under the law, they obviously don't want to be using 20
20 minutes a day of on duty rest break time; correct? That
21 wouldn't make sense?

22 **A.** I don't really fully understand. I mean, it is true that
23 some of the drivers said that one of the reasons they didn't
24 take breaks was specifically because they wanted to maximize
25 their driving time. Yes, that's true.

1 Q. Okay. So I guess my last question on this issue for you
2 is, since you don't feel comfortable answering the legal
3 interpretation questions of on duty versus off duty for rest
4 breaks, do you think it was appropriate for you to be relying
5 upon the drivers' answers in their depositions since they also
6 obviously are not lawyers and they don't have your experience
7 in this field?

8 A. I think it was perfectly appropriate. I think that
9 it's -- there are a lot of factual determinations that are left
10 to the jury and a lot of legal things that you all are going to
11 argue, and I think that as a factual matter, it is relevant
12 that people took breaks when they were getting paid for these
13 other things. And it's not for me ultimately to decide whether
14 that counts as on duty or off duty. I'm not giving that
15 opinion. But I think it's highly relevant that a majority, a
16 clear majority of the people that were asked said that they
17 took rest breaks while they were getting compensated for
18 something else because the time was just wait time. When
19 there -- when they actually had no other obligations, nothing
20 they actually had to do, so they took those opportunities to
21 take breaks.

22 I think it's a relevant factual issue. I think it's
23 perfectly appropriate for me to bring it up and it's perfectly
24 appropriate for me to explain, as I did, that what Dr. Phillips
25 did was he assumed affirmatively that that was not paid rest,

1 and that his analysis was based upon the affirmative assumption
2 that the time that people spent in rest breaks, as they
3 understood them, and when they were getting paid, didn't count.
4 His analysis is based on the affirmative assumption that that's
5 wrong.

6 I don't know for a fact, as a matter of law, that it's
7 not, but I'm thinking that that is a factual issue that it's
8 perfectly appropriate for me --

9 Q. In reading --

10 A. -- to bring to people's attention.

11 Q. In reading over his transcript of his testimony last week,
12 did you see that he said that he was asked by counsel to assume
13 that they were not paid rest breaks, which is an issue in this
14 case, so he was not asked to make any legal arguments in that
15 regard? Did you see that?

16 A. I saw that he said that he was asked to assume 20 minutes
17 of unpaid rest for everyone. I don't --

18 Q. So you're not criticizing --

19 A. I don't specifically recall what you just said, no.

20 Q. You are not criticizing Dr. Phillips. You are just
21 acknowledging that that was an assumption that he was asked to
22 make?

23 A. Yes. And his calculations were based upon the assumption
24 that there were 20 minutes of unpaid rest every day and that
25 there was no paid rest any day.

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1 Q. You reviewed the activity codes that Wal-Mart has
2 published during the life of this case; right?

3 A. Yes.

4 Q. In reviewing the written activity codes that you saw in
5 their manuals, did you see any activity code which included in
6 writing the act of doing a pre-trip inspection under another
7 activity code?

8 A. No, I did not see that.

9 Q. Did you see any activity code that included -- I'm going
10 to read now the whole list of them so we can keep moving.

11 Did you see any written activity code that -- published by
12 Wal-Mart and enforced with its workers, that said that it
13 included under any activity code a post-trip inspection for
14 washing, the fueling, the weighing, driver coordinator
15 meetings, roadside inspections, or rest breaks?

16 A. My recollection was that there was some discussion
17 explicitly about weighing. That a depart was, under certain
18 circumstances, as I recall, supposed to include actually
19 weighing off-site, if necessary, before the depart actually
20 happened. So weighing I think so, but the others, no.

21 Q. Okay. I won't debate the weighing with you. We will have
22 to look at that sometime other.

23 You talked about the subpoena process and bringing drivers
24 into the deposition process; correct?

25 A. Yes.

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1 Q. Okay. And I'm going to try and summarize the numbers for
2 you. I think we went over this at your deposition. You
3 understand there were about 104 people originally selected of
4 whom the first 40 would have been the random sample if they
5 were all produced; right?

6 A. Yes.

7 Q. And no one would expect the first 40 to actually appear;
8 correct? That's not reasonable; right?

9 A. I'm not surprised that they weren't.

10 Q. Right. That's pretty normal?

11 A. I don't know whether it was reasonable, but it's not
12 unreasonable that it wasn't the first 40.

13 Q. In fact, I think we can leave aside the six people who
14 were deceased. They obviously weren't going to appear;
15 correct?

16 A. It depends on what you are leaving them aside for. If you
17 are leaving them aside because you are saying that they
18 couldn't have contributed to nonresponse bias, then you're
19 wrong because there are different likelihoods of dying based
20 upon age. So drivers who left in 2004, 2005, 2006 are more
21 likely to be drivers who had died. And if there are
22 differences in experiences between drivers early in the class
23 period versus late, then the fact that some drivers died could
24 actually affect the reliability of the number.

25 Q. So the unfortunate passing of six of the drivers, in your

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1 mind, has a realistic input, you believe, or impact on how the
2 sample or how the questionnaire and the depositions eventually
3 came out? Is that what you are telling us?

4 A. I'm saying that it effects potentially whether or not the
5 ultimate sample is statistically reliable, yes.

6 Q. And then about 50 people, there was no ability to serve
7 process on them; correct? Is that what you understand?

8 A. Well, it's my understanding that there were 50 that the
9 process server went to, yes, and went to three times and didn't
10 reach.

11 Q. Went three times; correct? They were instructed to go
12 three times; right?

13 A. That's what people testified about, yes.

14 Q. And many of these people are still active drivers;
15 correct?

16 A. Yes.

17 Q. Whether they are working for Wal-Mart or somebody else,
18 they are active drivers; right?

19 A. I assume so, yes.

20 Q. You know from this file, that --

21 A. Wal-Mart drivers. I don't know about other companies, but
22 yes.

23 Q. You know from this file, that these drivers are off and on
24 the road for several days at a time; right?

25 A. That's my understanding, yes.

1 Q. It would be no surprise that people wouldn't be there to
2 be served with a subpoena to appear at a deposition; correct?

3 A. You're asking me whether I was surprised?

4 Q. I assume you weren't surprised by that?

5 A. I was surprised, because these are not people that are
6 unrelated to the case. These are your sort of putative
7 clients. This is not like when you're trying to reach people
8 that are totally unrelated to you. I was surprised that you
9 couldn't reach 50 people out of a hundred. Given that there
10 was --

11 Q. You do understand --

12 MR. EDELMAN: Excuse me, Your Honor. He needs to be
13 allowed to finish.

14 THE COURT: You can finish but keep it short.

15 BY MR. SALTZMAN:

16 Q. You are talking more than I am here today.

17 A. As far as I knew, there was no reason why you could not
18 have called these people up. Under those circumstances, I
19 don't -- I was surprised. I don't know why you needed to rely
20 upon a subpoena process for people that you are representing as
21 legal counsel. So, yes, I was surprised.

22 Q. So did you see in any of Dr. Phillips' reports or his
23 testimony, that in fact we clearly avoided contacting people so
24 we wouldn't taint that process and therefore left it to an
25 independent process server to be the first contact? We made no

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1 attempt to contact these people and taint the pool. You didn't
2 see any of that in Dr. Phillips' reports?

3 **A.** I didn't see it, and it doesn't make any sense given that
4 you had sent them letters already.

5 **Q.** Okay. In this case, sir, given the instructions that we
6 were not going to contact these people other than through a
7 process server, assuming that case, assuming that scenario,
8 which is how it went down, do you understand -- does it affect
9 your response as to whether you were surprised that 50 people,
10 who are full-time drivers mostly, could not be found in the
11 short time we had to try and get this process done? No impact?

12 **A.** You're asking am I not surprised given that if I assumed
13 that you hadn't ever contacted them, by the fact that you
14 couldn't contact them? I mean, I don't know how to answer that
15 question.

16 **Q.** Fair enough. Okay.

17 **THE COURT:** Mr. Saltzman, how much longer do you think
18 you have?

19 **MR. SALTZMAN:** Probably another 15 or 20 minutes.

20 **THE COURT:** Well, it's 3:30.

21 **MR. SALTZMAN:** I can finish it first thing in the
22 morning.

23 **THE COURT:** I think that's what we will do.

24 Ladies and gentleman, we will take our afternoon recess at
25 this time. If you would be back, please, at 8:30 tomorrow.

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1 The last I spoke with the lawyers, which has not been
2 recently but it was this morning, we were expecting we would
3 finish tomorrow so that's still my expectation.

4 Have a good evening. Don't talk to each other or anyone
5 else about this case. Don't make up your minds. You haven't
6 heard all the evidence yet.

7 (Proceedings adjourned at 3:30 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Wednesday, November 16, 2016

Pamela A. Batalo

Pamela A. Batalo, CSR No. 3593, RMR, FCRR
U.S. Court Reporter